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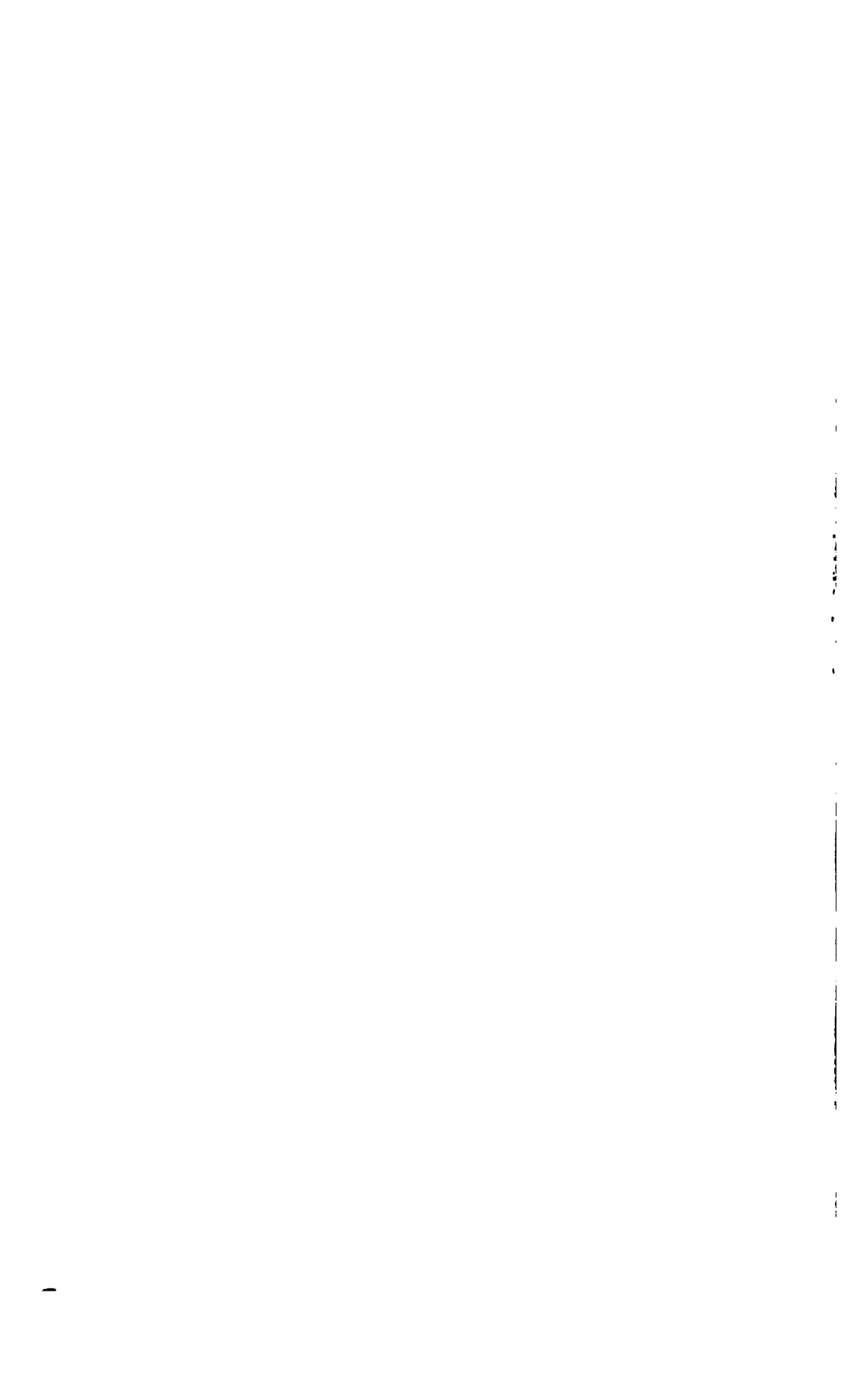
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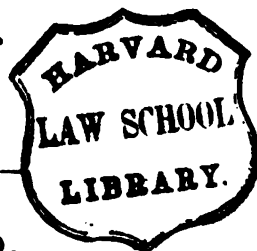
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE

CITY OF NEW YORK.

BY
JOHN DUER, LL.D.
ONE OF THE JUSTICES OF THE COURT



VOLUME V.

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J U S T I C E S
OF THE
NEW YORK SUPERIOR COURT,
DURING THE TIME OF THESE REPORTS.

THOMAS J. OAKLEY, CH. J.,	}	J U S T I C E S.
JOHN DUER,		
WILLIAM W. CAMPBELL,*		
JOSEPH S. BOSWORTH,		
MURRAY HOFFMAN,†		
JOHN SLOSSON,		
LEWIS B. WOODRUFF.‡		

* Term expired 1st of January, 1856.

† Re-elected for full Term from the 1st of January, 1856.

‡ Elected November, 1855, for full Term, from the 1st of January, 1856.

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NOTE.—The Reporter has received the same assistance from Mr. Justice Bosworth in the preparation of the present, as in that of the third and fourth volumes of these Reports.

C A S E S
ARGUED AND DETERMINED
IN
THE SUPERIOR COURT
IN THE
CITY OF NEW YORK.

JOSEPH KERNOCHAN *v.* NEW YORK BOWERY FIRE INSURANCE
COMPANY.

The insurable interest of a mortgagee in the property mortgaged corresponds in its amount with that of the debt, which the mortgage secures.

Hence, in the event of a total loss, he is entitled to recover the whole sum insured, provided it does not exceed that which at the time of the loss was due upon the mortgage. Evidence cannot be admitted to defeat or diminish his recovery by showing that the mortgaged premises, notwithstanding the loss, continued to be a full security for the debt.

Nor by this construction, does an insurance by a mortgagee lose its character as a contract of indemnity, since he can never recover from the mortgager for his own benefit the sum paid to him by the insurers. The insurers will either be subrogated to his rights and remedies under the mortgage, or the sum received from them will be applied to the satisfaction of the mortgage debt.

When an insurance is made by a mortgagee as such, it is reasonable to believe that the insurers, looking to a transfer to themselves of the mortgage securities in the event of a loss, will charge a lower premium than would be charged to an absolute owner. Hence, if the assured has placed it out of his power to make this transfer, the fact, as material to a proper estimate of the risk, as a general rule, ought to be disclosed when the insurance is effected. No such disclosure appearing to have been made in this case, and the question of a material concealment, not having been submitted to the jury, *held*, that the defendants were entitled to a new trial.

(Before OAKLEY, CH. J., DUKE and CAMPBELL, J.J.)

Heard, March term; decided, June term, 1855.

APPEAL by defendants from a judgment in favor of the plaintiff.

D.—V.

Kernochan v. N. Y. Bowery Fire Ins. Co.

The action was on a policy of insurance against fire, made by the defendants to the plaintiff, as mortgagee, and bearing date on the first of May, 1848. The insurance was for one year, and was renewed annually, and the last renewal was on the first of May, 1853. The insurance was for \$3,000, on a building No. 80 Cliff street, in the city of New York, and the like sum on a building No. 123 Pearl street. The complaint averred that on the 10th of December, 1853, and during the continuance of the insurance, the last-mentioned building was damaged by fire to the extent of \$4,000 and upwards, and that in Cliff street to the amount of \$492, and demanded judgment for the sum of \$3,492, with interest and costs.

The defence was that the plaintiff had never given notice of the loss to the defendants, nor delivered to them proof of the loss, according to the conditions of the policy, and also that as mortgagee he had sustained no damage, inasmuch as the mortgaged premises, after the fire, were worth more than the whole sum due to him upon the mortgage.

The cause was tried before the Chief Justice, by the consent of the parties, without a jury, on the 17th November, 1854. The policy, renewals, and the damage by fire to the buildings insured were proved as alleged in the complaint. It was also proved that notice of the loss was given to the defendants on the 19th of December, 1853, in a letter signed "Geo. F. Cooledge & Bro.," and describing them as owners of the buildings insured. It also appeared that the preliminary proof of loss delivered to the defendants was in the name of George F. Cooledge and William P. Cooledge, composing the firm of George F. Cooledge & Brother, and averred that they were at the time of the fire, and had been for several years previous, the owners of the buildings insured upon which the loss was claimed. The counsel for the defendants moved for a nonsuit, upon the grounds that no legal proof had been given of the service of notice of the loss and of the preliminary proof, as required by the conditions of the policy, and that the plaintiff had failed to show that, as mortgagee, he had sustained any loss from the fire.

The motion was denied, and the counsel excepted to the decision.

The defendants then gave in evidence a bond and mortgage,

dated in May, 1848, from George F. Cooledge and William P. Cooledge to the plaintiff, to secure the payment of the sum of \$21,500, with interest from the first of May, 1848. The mortgage covered the buildings and the lots on which they were erected, described in the policy, and it appeared by endorsements on the bond, that \$15,000 was the whole sum remaining unpaid at the time of the fire. It was then proved that the value of the buildings and lots after the fire, and notwithstanding the loss by the fire, was at least \$19,400.

The plaintiff then called as a witness William P. Cooledge, who testified that when he and his brother purchased the mortgaged premises from the plaintiff, he agreed to keep the buildings insured, for their benefit, with the defendants, and to hold the policy as a further security for the payment of the mortgage—that in compliance with this agreement he had kept the property insured for their benefit, and that they had repaid to him the premiums which he had advanced.

To the introduction of this evidence the counsel for the defendants objected. The objection was overruled by the court, and the counsel excepted.

Some other evidence was given, which it is not deemed material to state.

The Chief Justice rendered a judgment in favor of the plaintiff for the whole sum, with interest and costs, demanded in the complaint.

A. Thompson, for the defendants, moved for a reversal of the judgment and a new trial. He relied strongly upon the objections taken on the trial to the sufficiency of the notice and proof of loss, that had been received in evidence; and also insisted that in no case can a mortgager claim any benefit from a policy effected by a mortgagee in his own name, and that this is especially true when it appears that no notice or intimation was given to the insurers that any other interest than that of the mortgagee was meant to be covered. He also contended, that, considering the insurance as made for the sole benefit of the plaintiff, it was certain that he had sustained no loss for which he could claim an indemnity, since it was proved and was not denied, that the mortgaged premises, notwithstanding the fire, were more than a sufficient security for

Kernochan v. N. Y. Bowery Fire Ins. Co.

his debt. Among other cases, the learned counsel cited—*Turley v. N. Amer. Fire Ins. Co.* 25 Wend. 374; *McMasters v. West. Ins. Co.* id. 379; *McLaughlin v. Wash. Co. Ins. Co.* 23 Wend. 525; *Colum. Ins. Co. v. Lawrence*, 10 Peters, 507; *Curry v. Commer. Ins. Co.* 10 Pick. 536; *O'Neil v. Buffalo Fire Ins. Co.* 3 Comst. 182; *Inman v. West. Fire Ins. Co.* 12 Wend. 185; *Packard v. Hill*, 7 Cow. 484. 3/

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D. Lord, for the plaintiff, argued that it was plain, from the terms of the policy, that the insurance was meant to be on the buildings themselves, and not on the sufficiency of the plaintiff's security for his debt; and that his agreement to insure the property, for the benefit of the mortgager, created an insurable interest in him to the whole value of the buildings. It was no answer, to say that this agreement was not disclosed. There was no inquiry on the subject, and no representation or concealment, that could vary the risk of fire, the only risk that the defendants assumed. The fact, that on the face of the policy the plaintiff was described as mortgagee, was, moreover, constructive notice, making it the duty of the defendants to ascertain by inquiry the extent and terms of the mortgage security. As to the formal objections to the preliminary proofs and notice, if the plaintiff, for the reasons stated, was entitled to recover, they were evidently groundless. The counsel cited *Oliver v. Greene*, 3 Mass. R. 123; *Bartlett v. Walter*, 13 Mass. 267; *De Forrest v. Fulton Ins. Co.* 1 Hall R. 110; *King v. State Mut. Ins. Co.* 7 Cushing R. 3; *Roberts v. Traders' Ins. Co.* 17 Wend. 631.

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BY THE COURT. DUER, J.—It is needless to cite authorities to prove that, by our law, a mortgagee has an insurable interest, corresponding in its amount with that of the debt which the mortgage was intended to secure; and we apprehend it to be equally certain, that, in the event of a total loss, he is entitled to recover the whole amount insured, provided it does not exceed that which at the time of the loss was due upon the mortgage. We do not believe, and certainly have not been able to discover, that there is any adjudged case, in which evidence has been admitted to show that the mortgaged premises, notwithstanding the loss, were still an ample security for the debt; and we think ourselves warranted to affirm, that in no text-writer, foreign or domestic, is any intimation to be

found that such evidence can be received, to defeat or diminish the recovery of the assured. Hence, were there no other defence in this case than that the plaintiff has not been damnified, we should have no difficulty in holding that he is entitled to retain the judgment that has been rendered.

It is indeed true, as was insisted by the counsel for the defendants, that, in this state, since wager policies have been abolished, the assured, whether in a marine or fire policy, can never be permitted to recover more than a full indemnity for the loss which it is proved that he sustained; but it is a mistake to suppose that this salutary rule is violated by permitting the assured, when a mortgagee, to recover the sum insured, when it is proved that such was the amount of his debt and of the loss upon the property insured. Although his recovery, under these conditions, is allowed, there is no case in which he will recover more than an indemnity, for his actual loss, since, according to the nature of the contract and the intention of the parties, the sum, which he receives under the policy, must either be applied to the satisfaction of the mortgage, or its payment by the insurers will operate as a transfer to them of his own interest in the debt and its securities. There is no case in which, after the payment of a loss, he will be allowed to enforce for his own benefit the payment of the debt. He can never recover from the mortgager for his own benefit the sum which has been paid to him by his insurers.

We pass to the consideration of that which we deem to be the only serious question in the case, namely, whether it appears from the evidence that there has been such a virtual misrepresentation, or concealment, of material facts, as may have the effect of avoiding the policy.

We consider the law as fully settled, that where an insurance is made by a mortgagee, *eo nomine*, or with the sole view of protecting his own interest as such, the payment of a loss has not the effect of discharging in whole or in part the mortgage debt, but on the contrary operates in equity, and in this state, since the Code at law, as a transfer of the debt and all its securities to the insurer, who, in the language of the Roman law, is subrogated to all the rights and remedies of the assured; nor is this doctrine limited in its application to an insurance by a mortgagee. The rule is universal, that, where a total loss is paid, the underwriter succeeds to all

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the collateral remedies to which the assured might have resorted for obtaining its compensation. (*Kendall v. Cochran*, 1 Ves. 98; *Gracie v. N. Y. Ins. Co.* 8 John. R. 245; *Mason v. Sainsbury*, 2 Park on Ins. by Hildyard, 959; *Clark v. Inhabitants of Blything*, 2 B. & C. Rep. 254; *Yates v. White*, 5 Scott, 640; *Atlantic Ins. Co. v. Storrow*, 5 Paige, 286; *Tyler v. Aetna Ins. Co.* 12 Wend. Opinion Nelson, J. 516 S. C.; Opinion Chan. Walworth, 16 Wend. 397, 398; *Carpenter v. Providence Washington Ins. Co.* 16 Peters, 495; Marsh on Ins. 242; 2 Phillips, 419; 3 Kent's Com. 371 n.) We are aware that in the case of *King v. State Mut. Ins. Co.*, (7 Cushing 8,) opposite views of the law were taken by the Supreme Court of Massachusetts, and were explained and defended by the Ch. J. (Shaw) in an elaborate opinion; but the conclusions at which the learned Judge arrived are not only irreconcilable with the authorities to which I have referred, but, it seems to us, are inconsistent with the nature of an insurance as a contract of indemnity. Hence, whatever may be the rule that would now be followed in Massachusetts, we retain the conviction, that the general law of insurance relative to the construction of a policy upon the interest of a mortgagee, as declared in our own courts and in those of the United States, is such as has been stated. Such being, in this state, the known law, it is reasonable to believe, that when the interest of the assured is described in the policy, or is represented to the insurers as that of a mortgagee, a much lower premium will be charged than when the insurance is made for an absolute owner. It is reasonable to believe, that the insurers will rely upon a transfer of the debt and its securities, as furnishing the means, if not of wholly reimbursing, yet of greatly reducing the amount of any loss they may be required to pay; and that the premium charged will, therefore, bear no more than a just proportion to the probable reduction of their eventual liability. Hence, if the assured has by his own act placed it out of his power to make to the insurers the transfer, upon which they were justified in relying, and the fact was not disclosed to them when the policy was effected, it would seem, upon principle, that the concealment, as having deprived them of the premium they would otherwise have demanded, must be regarded as material and fatal.

To apply these observations to the case before us; it appears that, before the policy in suit was effected, it was agreed between

the mortgagers and the plaintiff that he should insure, as mortgagee, and keep insured, the building covered by the mortgage, for their benefit, and at their expense, he holding the policy for his security; and it is also proved that they have repaid to him the premiums which he advanced. It is not denied that, as between the parties, this agreement is valid; and its effect manifestly is, that if the loss that is claimed shall be recovered from the defendants, the amount must be applied *pro tanto* in satisfaction of the mortgage debt, since it is only by such an application that the insurance can be made to enure to the benefit of the mortgagers. The defendants will therefore be prevented from acquiring a beneficial interest in the debt and its securities, in proportion to the sum which, in satisfaction of the loss, they will be compelled to pay, although to this interest, with all proper remedies at law and in equity for its protection, but for the agreement, they would certainly have been entitled. The effect of the agreement was, therefore, to change the nature of the contract, by making that which on the face of the policy is an insurance for the benefit of the plaintiff, as mortgagee, an insurance for the benefit of the mortgagers, as owners. We are not disposed, however, to deny that if the existence and terms of the agreement had been made known to the defendants when the insurance was effected, the policy, in its actual form, might still be regarded as a valid contract, and the plaintiff be entitled to recover for the benefit of the mortgagers, and as their trustee, the full amount of the loss which is claimed; but there is no evidence to show that this disclosure was made, nor has it been asserted that such was the fact. We are therefore driven to the consideration of the question whether the omission to make this disclosure, taking into consideration the terms of the policy, was a virtual misrepresentation or concealment of a fact which, as material to the risk which the defendants consented to assume, the plaintiff was bound to communicate.

The learned and experienced counsel for the plaintiff strenuously contended that as no inquiries were made by the defendant, the plaintiff was under no obligation to disclose the nature and extent of his own interest, or of the rights and interests of the mortgagers, and he rested his argument upon the ground that as the fact not disclosed had no tendency to increase or vary the risk of fire,—the only risk covered by the policy,—they were not ma-

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terial, or if in any point of view they could be regarded as material, the defendants had constructive notice of their existence. They knew that the plaintiff was a mortgagee, and if they wished to know the terms of the contract between him and the mortgagers, they were bound to inquire. By omitting to inquire they waived the information, and the policy must, therefore, receive the same construction as if the information had been given. The next inquiry, therefore, is, whether these positions can be sustained.

It is undoubtedly true, as a general rule, that the assured is not bound to communicate to the underwriters the particular nature of his interest in the property insured, but from this rule there are many exceptions. There are cases, as when the insurance is upon freight, bottomry, profits, &c., in which, in order to render the contract valid, the nature of the interest must be specified in the policy. And others, in which the nature of the interest, when special, although not necessary to be stated in the policy, must, even where no inquiry is made, be disclosed to the underwriters. It may be admitted that the interest of the assured has no connection with, or influence upon, the risks insured, considered in themselves. Whatever may be his interest, they remain the same, yet there still are cases in which the particular nature of the interest is essential to be known to enable the underwriter to form a proper estimate of the premium which he ought to require, and, we apprehend, that in all such cases, the effect of a misrepresentation or concealment of the interest, is either to discharge the insurer from the loss, or to avoid the policy—nor do we doubt that these observations are just as applicable to an insurance against fire as against marine risks.

To illustrate and support them, we shall refer to a few decisions:—

In an early case which arose in the circuit of that eminent Judge, Mr. Justice Washington, the interest of the plaintiff, who was insured generally, and claimed a total loss, was of a very special nature, arising from his having given security to be answerable for the value of the ship and cargo insured, in the event of their condemnation as prize of war. The Judges (Washington and Peters) were of opinion that it was not necessary that the nature of the interest as special should have been stated in the policy, but that it probably ought to have been communicated to the defendants,

and they instructed the jury that should they be of opinion that a knowledge by the insurers of the special nature of the interest that was meant to be covered, would have altered the amount of the premium, and that the fact had not been sufficiently disclosed, the omission to make the disclosure vacated the policy. (*Russell v. Union Ins. Co.*, 4 Dallas, 421.)

In a much more recent case, decided by Mr. Justice Story, (*Ohl v. Eagle Insurance Co.*, 4 Mason, 397;) the doctrine as to the necessity of a disclosure where the interest is special, was carried still further. The plaintiff in this case claimed to recover a total loss upon the entire ship insured, although it appeared from the register and other papers that he had a legal title, as part owner, only to a moiety. He endeavored, however, to establish an equitable title to the other moiety by parol evidence, but the learned Judge held that as this equitable interest had not been disclosed to the underwriters, no evidence could be admitted to prove its existence, and that the recovery of the plaintiff must therefore be limited to one half of the amount which he claimed.

There is an important distinction between these cases to which it is necessary to advert. Mr. J. Story in effect decided that the omission to disclose the peculiar nature of the interest of the assured was of itself a bar to his recovery, by rendering the insurance void as to the interest concealed, while Mr. J. Washington, and his associate, held that the effect of the omission depended solely upon its materiality, which, as a question of fact, it belonged to the jury to determine, and it is this opinion which we hold ourselves bound to follow, not only as more consonant to the analogies of the law, but as fully sustained by other adjudged cases.

Thus in the case of *Oliver v. Greene*, which arose in the Supreme Court of Massachusetts, (8 Mass. 133,) the plaintiff, as in the case of *Ohl v. The Eagle Insurance Co.*, was the legal owner of one half of the vessel insured, and had a special property in the other moiety, which was neither specified in the policy, nor made known to the defendants when the insurance was effected, and their counsel therefore contended that by its concealment they were discharged from the loss. But the court said that, although the concealment, if material, would avoid the policy, yet they had no right to presume that it was material; evidently meaning, that the question ought to have been submitted to the determination

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of the jury, but, at the same time, affirming the doctrine that such a concealment, when found to be material, is fatal to the contract.

The case which bears the nearest resemblance to the present, as the insurance was against fire on land, and which, as a decision of the Supreme Court of the United States, also carries with it the highest authority, is that of *Lawrence v. The Columbian Ins. Co.* (2 Peters' S. C. R. 25, 26.) The plaintiffs in their application for the insurance, stated that the buildings to be insured belonged to them, but it appeared upon the trial, that they were not the legal owners, but had only an equitable and contingent interest. The Judge, however, who presided on the trial, instructed the jury that the omission of the plaintiffs to disclose the peculiar nature of their interest, was not a concealment that could be regarded as material, and the counsel of the defendants, upon this and other grounds, excepted to his charge. The Supreme Court sustained the exception, and in their opinion laid down the general rule, that in all cases where the nature of the interest meant to be insured, may influence the mind of the underwriter in estimating the premium, it ought to be disclosed. When the case was again before the court, after a second trial, all the Judges adhered to this opinion, holding this language, "That a decisive test to ascertain whether a misrepresentation or concealment is material, is to ascertain whether, if the true state of the title had been known, it would have enhanced the premium. If it would, the misrepresentation or concealment is fatal to the contract." In the case before us, the decisive test has not been applied; if it ought to be, there must be a new trial.

It may be said, that the cases that have been cited, have no present application, since, in the case before us, the nature of the interest of the plaintiff or mortgagee was not merely disclosed to the defendants, but was specified in the policy. But in reality it was not his own peculiar interest, as mortgagee, that was meant to be covered by the policy, but substantially that of the mortgagors', as owners, and hence, his omission to disclose the agreement which made it his duty to make the insurance for their benefit, and which is relied on as giving that construction to the policy, was, certainly and emphatically, a concealment of facts affecting the title or interest insured, and we have no right to say, that had these facts been known to the defendant, they would not have operated to

enhance the premium. The present case is, in truth, stronger than any one of those that have been cited. It is not the case of a mere concealment. The description of the plaintiff in the policy was calculated to mislead the defendants. It warranted them to believe that it was his own interest as mortgagee, that alone was meant to be insured, and consequently, that on the payment of a loss, should a loss happen, they would be entitled to the transfer of the debt. It operated, therefore, by a concealment of the fact, that no such transfer could be made, as a virtual misrepresentation:—as affirming by implication that which was known to be untrue.

It appears to have been held by the Supreme Court at Washington, in the case of *Carpenter v. the Providence Washington Ins. Co.*, (16 Peters, 496,) that in no case can a mortgager take any benefit from an insurance made by the mortgagee as such, and in delivering his judgment, Mr. J. Story denied that "any court could be at liberty to construe a policy made by A, in his own name, to be not a policy in his own interest, but on the interest of B, who is a stranger to the contract." The learned Judge evidently meant, that the explanatory words by which alone an insurance made by one person in his own name may be extended to protect the interest of another, must be found in the policy itself, but we do not think that the decisions in our own courts and in England require us to carry the doctrine to this extent. When the necessary explanation is in fact made, and the underwriters assume the risk, knowing that the insurance is made by a mortgagee for the benefit of the mortgager as well as his own, we do not doubt that the policy is binding, and a loss recoverable. To warrant a recovery, however, it must appear either that the proper disclosure was made, or that the concealment, in the particular case, was immaterial.

It follows, from the observations already made, that we do not assent to the position that the defendants are chargeable, in law, with a knowledge of the agreement between the plaintiffs and the mortgagers, and are bound by its terms, to the same extent that they would have been, had these terms been expressly communicated. We do not think that the doctrine of constructive notice is applicable to the case. The defendants are, probably, bound by all the provisions and stipulations contained in the mortgage itself, but it would be most unreasonable to impute to them the

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knowledge of a distinct, collateral, and verbal agreement varying the usual construction of the policy, and the nature, as it would otherwise have been understood, of the interest insured. We apprehend that the doctrine of constructive notice, as excusing an express disclosure, is only applicable when from the facts already known to the insurer, he was bound to infer the existence of other facts, which, although material, were not communicated. It is in such cases only that, if he desires fuller information, he is bound to inquire, and that his silence is construed as a waiver of a more explicit disclosure. (*Carter v. Boehm*, 3 Burr, 1905; *Craut v. Masterman*, 3 Douglas, 161; *Kneeland v. Glover*, 7 East. 457; 1 Emerigon, 172.) The defendants in this case so far from having any reason to believe or suspect that the insurance was made for the benefit of the mortgagers, were justified in believing, as we have already said, that it was made for the benefit of the plaintiff alone.

Our conclusion is, that for the purpose of applying the decisive test, which it has been shown is necessary to be applied in cases like the present, it is our duty to grant a new trial. We have no right to say, as a court, whether the omission of the plaintiff to make known to the defendants that the insurance was effected for the benefit of the mortgagers, as well as his own, was or was not a material concealment. We have no right to say, that had all the facts been known to them, they would not have demanded a larger premium than that which they actually received. These are questions of fact which it is the exclusive province of a jury to determine. They were not determined, nor meant to be determined, upon the trial already had. That they may be, a second must be allowed.

We deem it unnecessary to discuss the questions that have been raised as to the sufficiency of the preliminary proofs. They depend entirely, in our opinion, upon the construction and effect that may ultimately be given to the policy. If, upon the questions of misrepresentation and concealment, a verdict shall be rendered in favor of the plaintiff, the objections to the preliminary proofs will be no bar to his recovery of a judgment.

New trial granted. Costs to abide the event.

COCHRAN, Appellant, v. SHERMAN and others, Respondents.

The defendants owned a vessel, which formed part of a line of E. D. Hurlbut & Co., running between New York and Mobile, and consigned by E. D. H. & Co. to W. & S. of Mobile. W. & S. collected the freight, paid the disbursements, and, by direction of the captain, procured freight for the vessel to Barcelona. They having advanced \$264.36 over and above the freight collected, and he wishing more money, they advanced him the further sum of \$235.64. The captain drew a bill to his own order on two of the defendants for \$500, and endorsed it. The plaintiff discounted it, at the instance of W. & S., who did not endorse it. They received the money, and credited it in their account. The drawers refused to accept or pay the bill. Some months subsequently, W. & S. assigned to the plaintiff their account against the owners, and all claims by reasons of the advances they had made to the captain of the vessel.

Held, that the mere drawing and negotiation of the bill, which the drawees refused to accept, gave to the plaintiff no right of action against either defendant.

The claim of W. & S. not having been assigned to the plaintiff on his discounting the bill, but, on the contrary, having been paid with the proceeds of it, the subsequent assignment of it to the plaintiff was a nullity, and gave him no additional claim upon the defendants.

(Before DURE, BOSWORTH and HOFFMAN, J.J.)

Heard, May term; decided, June term, 1855.

THIS action came before the court, on an appeal from a judgment entered on the report of John L. Mason, referee. The facts, as found by the referee, are as follows, viz.:

The defendants were, in the months of July and August, one thousand eight hundred and forty-nine, and for some time previous and subsequent thereto, the owners of a bark or vessel called the *Ophir*, whereof one H. W. Ramsdell was the master. By some arrangement, (the particulars whereof did not appear,) made between the defendants and the firm of E. D. Hurlbut & Co. the said bark was placed in the line of packets owned by the latter firm, running between New York and Mobile, and arrived at Mobile in the month of June, one thousand eight hundred and forty-nine, with an assorted cargo of dry goods, consigned by the said E. D. Hurlbut & Co. to Whittaker & Sampson, the agents in Mobile of the said line.

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Whittaker & Sampson collected the freight and paid all the disbursements of the vessel, and by the directions of the captain, procured a freight for her to Barcelona, and paid all the expenses of loading, manning and victualling her for her foreign voyage. They also paid the captain, from time to time, such moneys as he needed for his personal expenses.

When Whittaker & Sampson's account was made up, just before the vessel sailed on her voyage to Barcelona, it was found that the expenditures of Whittaker & Sampson, over and above the freight received by them, amounted to two hundred and sixty-four dollars and thirty-six cents, and thereupon they advanced to the said captain the further sum of two hundred and thirty-five dollars and sixty-four cents, making the balance claimed by them to be five hundred dollars; for this last mentioned sum, the captain drew an order on Messrs. G. & J. Sherman, two of the defendants, bearing date the thirtieth day of August, one thousand eight hundred and forty-nine, payable to his own order, and by him endorsed in blank.

This order was negotiated to the plaintiff, who advanced the whole amount thereon, which was paid to Whittaker & Sampson. They did not endorse it. Afterwards, and in the month of September, one thousand eight hundred and forty-nine, it was presented for acceptance and also for payment to the drawees, and acceptance and payment refused. In the account of Whittaker & Sampson, they give credit for the five hundred dollars, as follows: "By Capt. Ramsdell's draft at three d-s, on G. & J. Sherman, New York, taken at par, for balance of ac. \$500," but Mr. Whittaker, in his testimony, says, that the draft was negotiated by him for Capt. Ramsdell, without fee, at par, after Capt. Ramsdell had been unsuccessful in obtaining the amount, by valuing on his freight to Barcelona.

Afterwards, and on the fifth day of July, one thousand eight hundred and fifty, Whittaker & Sampson assigned their account against the bark and owners, for the disbursements aforesaid, to the plaintiff, and it is upon this account, and for the balance of five hundred dollars, for which the captain gave the order, that the present suit is brought.

The disbursements were sufficiently proved, except the last payment of two hundred and thirty-five dollars and sixty-four

cents to the captain, as to the necessity of which further evidence would, in my judgment, be necessary to entitle the plaintiff to recover, if he can recover at all in this action.

Upon these facts I am of opinion, that when Whittaker & Sampson received the proceeds of the draft, their claim upon the account was extinguished. It made no difference whether the draft was negotiated by them for Captain Ramsdell, or whether they took it from him in payment, and then negotiated it to the plaintiff as they did not endorse it or become responsible to the plaintiff in case the drawees should refuse acceptance and payment. Their demand was paid in full, and could not be assigned ten months afterwards to the plaintiff.

The complaint must be dismissed with costs.

All which is respectfully submitted.

Dated, New York, May 17, 1853.

A. J. Willard, for appellant.

Wm. Bliss, for respondent.

BY THE COURT. BOSWORTH, J.—The draft or bill, drawn by the master to his own order, on G. & J. Sherman, two of the defendants, and which they refused to accept, by its own mere force never gave to any holder of it a right of action against either defendant.

When it was negotiated to the plaintiff, the account of Whittaker & Sampson was not transferred with it. The plaintiff cashed the draft for Ramsdell, and the money received was paid to Whittaker & Sampson in satisfaction of the balance of their account. They did not endorse it, and were not parties to it. Payment to them extinguished all claims which they had either against Ramsdell, or the owners of the vessel. Any subsequent assignment by them of the account would transfer no right to the assignee.

The drawing of the bill by the master, and the negotiation of it by him, if it had been negotiated without the assistance of Whittaker & Sampson, could not transfer or affect their claim, if they had any, upon the owners of the vessel.

The claim, which the complaint alleges was subsequently assigned to the plaintiff, and which, the assignment shows, was

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made on the 5th of July, 1850, was a claim of Whittaker & Sampson against the bark Ophir and owners. This claim had been fully paid and satisfied to them as early as the 31st of August, 1849.

Even if they had a valid claim against the owners to the amount of the bill, and they had drawn a mere bill of exchange to the plaintiffs' order on the defendants, for a sum equal to the balance of the account, and the plaintiff had bought the bill of them, the mere negotiation of the bill would not have operated as an assignment of the account. (*Cowperthwaite v. Sheffield*, 2 Coms. 243; *Luff v. Pope*, 5 Hill, 413; 7 id. 577.) But the bill in question was not drawn by them, but by Ramsdell.

Its proceeds satisfied their claim in full. Their subsequent assignment of it was a nullity. The plaintiffs' only remedy, on the facts as they appear in the case before us, is against the drawer of the bill. The referee decided correctly, and the judgment entered upon his report must be affirmed.

JOHN B. BRAHMS and others v. JAMES F. JOYCE.

This action was brought by a debtor and assignor, and some of his creditors, on behalf of all the creditors, against the assignee, charging him with fraud or gross negligence in the sale of the property assigned to him for the benefit of the creditors, and praying that he might be compelled to account for the full value of the property sold. On the trial the debtor was offered as a witness on behalf of his co-plaintiffs, and rejected.

Held, that he was properly rejected, as he was jointly interested with the creditors who were plaintiffs, and could not have given any material evidence that would not have enured to his own benefit as well as that of his co-plaintiffs.

A creditor, not a plaintiff on the record, was also offered as witness on behalf of the plaintiffs, and was rejected as incompetent.

Held, that he ought not to have been excluded, for although the action was brought for all the creditors, he was not in any legal sense of the term a party to the action, nor was it prosecuted for his immediate benefit, according to the interpretation that, in other cases, has been given to those words.

Judgment reversed and new trial ordered, with costs to abide the event.

(Before DUEK, BOSWORTH and HOFFMAN, J.J.)

Heard, May term; decided, June term, 1855.

THIS was an appeal, by the plaintiff Brahms, from a judgment at special term in favor of the defendant.

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The nature of the action, and the questions involved sufficiently appear in the opinion of the Court.

J. D. McGregor, for the plaintiff, appellant.

C. Jones, for the defendant.

BY THE COURT. HOFFMAN, J.—The plaintiff, Brahms, unites with the other plaintiffs, members of a firm, and his creditors, in filing this complaint on behalf of themselves and all other creditors of said Brahms, who shall come in and contribute.

They set forth an assignment made by Brahms to the defendant on the 11th of June, 1852, of all the fixtures, furniture, liquors, &c., in the building, No. 8 Fulton street, with the lease of the premises and the good-will of the business, with all notes, book-accounts, &c., to sell the same upon such terms as may in his judgment appear best, and most for the interest of the parties concerned, and for cash only. The avails were to be applied in payment of a certain note, two judgments, and servants' wages in full, and the residue to be distributed among all his creditors *pro rata*, if not sufficient to discharge their demands in full.

The case attempted to be made by the plaintiffs was, that the defendant took possession of property to the value of \$10,000, and almost immediately sold the premises No. 8 Fulton street, with the stock and good-will, for a grossly inadequate price, and without giving reasonable or proper notice, by advertisement or otherwise, and that such sale was not for cash only.

The complaint prays that the defendant may be removed, and that he account for the full value of such leasehold premises, stock, &c., and also for an injunction and receiver.

It appears that at the time of the assignment, the stock, &c., were under seizure by the sheriff, upon an execution in favor of one Fox and others against Brahms. The sheriff had advertised the property for sale. There was also a mortgage upon the property, given upon the purchase, upon which was due about \$540.

The property brought \$2,750, and the purchaser sold it within a few days for \$5,700. But the force of this piece of testimony is much diminished by the purchaser's statement, that after receiving \$400, for damage done by a fire, he lost over \$4,000, hav-

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ing expended about \$1,000, and that he never was more sick of a place than of that. The other testimony upon the question of value is about balanced.

We do not see any reason to interfere with the finding of the Judge in this particular.

The plaintiff's counsel offered Brahms as a witness on behalf of the other plaintiffs besides himself, which offer was overruled by the Judge, and an exception taken. The first offer was to examine him generally.

The 397th section of the Code is, that "a party may be examined on behalf of his coplaintiff, or a codefendant as to any matter in which he is not jointly interested or liable with such coplaintiff, or codefendant, and as to which a separate, and not joint verdict or judgment can be rendered."

This section must be construed in connection with the 398th and 399th sections. By the former, no person offered as a witness shall be excluded by reason of his interest in the event of the action. But by the next, this section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended.

As to a party then, an interest in the event of the action as effectually excludes him, as it would have done any witness before the Code. But then the 397th section permits an examination of a party, on the application of a party associated with him, as to matters in which he is not jointly interested with that party, and as to which a separate judgment could be rendered in favor of, or against that party.

We consider the effect of these provisions to be this:—If it is manifest, that no material evidence can be given upon the issues in the cause by the party offered, which will not enure to his own benefit, and the verdict must be in favor of all, the party should be excluded.

We do not consider the case of *Beal v. Finch*, (1 Kernan 128,) to be in conflict with this view. There in an action against several defendants for an assault and battery, separate answers denying the charge were put in, and at the trial, one of the defendants was offered as a witness on behalf of his codefendant. He was rejected, and the Court of Appeals held that the rejection was wrong.

Now it is obvious, that in such an action, as in torts generally, there may be, and frequently are, verdicts in favor of one, and against another party; in other words, a separate verdict and judgment. So as in the instances put by the learned Judges, a large number of questions may be very pertinent in which the party examined has no joint interest at all, but solely pertinent to the separate case of the defendant calling him.

But, here, it is scarcely possible to imagine a question, material to the issue, which could be addressed to Brahms, the answer to which, if against the defendant, would not necessarily be to Brahms' own benefit. The object of the suit is to obtain from the defendant a fund applicable to pay Brahms' creditors, and possibly something to Brahms himself. We think the ruling of the Judge was correct.

Another exception to the ruling of the Judge is, that he refused to permit the examination of one Butler, on behalf of the plaintiffs, on the ground that he was a creditor of Brahms, and that the suit was prosecuted for his immediate benefit. Butler was sworn as a witness, and admitted that he was a creditor on his examination.

This court has in several cases construed this section of the Code, and laid down the general rules thus: that it must appear, in order to disqualify the witness, that he is a *cestui que trust*, or has given an indemnity which makes him the real party in interest, that is, an indemnity in the action, and that such action is prosecuted or defended at his instance. (*Catlin v. Hanson*, 1 Duer, 329; *Van Wyck v. McIntosh*, 2 Duer, 86; *Giberton v. Alcock*, May, 1855, MSS.)

The position of a creditor not named in the complaint, in relation to an action of this nature, is this: If it proceed to a judgment of account and distribution of the fund in question, it is a judgment in his favor, upon establishing his own demand. It is not merely a judgment which will directly enure to his benefit, but he will be prohibited from instituting any other suit, and he is entitled to interfere in cases of neglect by the actual plaintiff to control the suit. Prior, however, to such a judgment, he is at liberty to proceed with his own separate action. And if the creditor's suit fails, and no decree is pronounced, he is at liberty to go on with his own,

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if one has been commenced, or institute a new one. He is not bound until after judgment, for he cannot interfere till then.

If a judgment is pronounced in this action against the defendant, it would be as fully a judgment in favor of a proposed witness who is a creditor, as of the creditors actually parties to the record. It would seem, then, that any creditor ought to be rejected.

But we consider that, under the provision of the Code, this proposition admits of a qualification. The phrase is, that the 398th section is not to apply "to any person for whose immediate benefit the action is prosecuted or defended." We think that it should appear, not merely that the creditor proposed as a witness is in a legal situation, in which the judgment may avail him, but that it should appear positively and unequivocally that he will receive the fund, or a portion of it. For example, it may appear that a creditor under an assignment is one to be paid in preference, and the fund which he is called to increase must go to him, and that he will not be paid in full without the increase. He would then be inadmissible. But if it is not certain that he must receive a direct benefit, but this depends upon contingencies, which leave it uncertain, he shall be considered competent.

The converse proposition is undoubtedly plausible, viz.: that the proposed creditor should be deemed inadmissible, unless it plainly appear that he could not be benefited. But the rule which we have stated appears to us most consistent with the intention and true meaning of the Code, and with the series of authorities in our own court. In *Davies v. Cram*, (4 Sandf. 355,) in a suit by assignees to recover a fund, not only the assignor, but one of his creditors, protected by the assignment, was admitted as a witness.

Testing the present case by this rule, the proposed witness will appear to be admissible. It is true, that if the subsequent sale of the property afforded a fair estimate of its value, with which to charge the defendant, the witness may possibly receive something, after paying all the preferred creditors. But this is wholly conditional and uncertain. It depends upon the amount of the increase of the fund, and the amount of the prior preferred debts, and of the separate debts of Brahms.

It cannot be known with any approach to certainty whether he will receive a benefit or not, without a full accounting and the adjustment of all antecedent demands upon the fund. We are,

for these reasons, all of opinion that the Judge erred in excluding him as a witness.

The judgment must be reversed, and there must be a new trial, with costs to abide the event.

CATHERINE M. JOHNSON, Executrix, &c., v. THE HUDSON RIVER
RAILROAD COMPANY.

In an action to recover damages for injuries to the person occasioned by the negligence of the defendant, the burden of proving that there was a want of ordinary care on the part of the person injured, which contributed directly to the accident, rests upon the defendant. The plaintiff, in order to maintain the action, is not bound to prove a negative by showing affirmatively that there was no such want of ordinary care.

No exception, not established by precedents that the Court is bound to follow, ought to be admitted from the general rule, which casts the burden of proof upon the party holding the affirmative.

Whether the evidence on the part of the plaintiff justifies the inference that the negligence of the person injured contributed to the accident, is a question for the determination of the jury.

Judgment dismissing complaint reversed, and new trial ordered; costs to abide the event.

(Before DURE, BOSWORTH and HOFFMAN, J.J.)

Heard, May term; decided, June term, 1855.

APPEAL, by plaintiff, from a judgment dismissing the complaint.

The action was brought for the recovery of damages resulting to the widow and children of Peter A. Johnson, deceased, the plaintiff's testator, from his death, and the complaint averred that his death was occasioned solely by the injuries and wounds he had received from being run over, on a public highway, by a car belonging to defendants, and that this accident was owing entirely to the negligence of the servants of the defendants, in the management and running of the car. The answer denied such negligence, and averred that the injuries to the deceased were caused solely by his own negligence and inattention.

The cause was tried before Campbell, J., and a jury, in November, 1854.

Upon the trial, evidence was given on the part of the plaintiff, tending to prove all the material allegations in the complaint, but

leaving it somewhat doubtful, whether the deceased had not himself been guilty of a want of ordinary care, contributing to the accident.

When the testimony on behalf of the plaintiff was closed, the counsel for the defendants moved the court to dismiss the complaint upon the grounds, 1st, That there was no proof of negligence on the part of the defendants, and, 2d, That there was no evidence showing that the deceased was not guilty of negligence, which contributed to the accident.

The learned Judge granted the motion, holding that the evidence given was not sufficient to prove that the deceased was free from negligence, and the counsel for the plaintiff excepted to the decision.

The cause was heard upon a case containing the evidence and the exception.

J. B. Sheys, for the plaintiff, contended that the Judge had erred in dismissing the complaint, and that the judgment ought therefore to be reversed, and a new trial ordered.

W. Fullerton, for the defendant, relied upon the decision of the Supreme Court of Massachusetts, in *Lane v. Crombie*, (12 Pick. 177,) as proving that in actions of this nature, the plaintiff is not entitled to recover unless he shows affirmatively that the person injured was wholly free from fault. He also contended that the evidence proved that the negligence of the deceased was the true and sole cause of the accident.

BY THE COURT. DUER, J.—We are all of opinion that the evidence, on the part of the plaintiff, was quite sufficient to take the cause to the jury. If not contradicted, it was sufficient to prove that the fatal accident, which has given rise to this action, was, in reality, caused by the culpable negligence of the servants of the defendants, and whether the evidence was also sufficient to warrant the inference that there was a want of ordinary care on the part of the deceased, which contributed to the accident, was a question which it belonged, not to the court, but to the jury alone to determine. Nor did our brother, who tried the cause, otherwise decide. It is apparent that he did not withdraw the case

from the jury because he deemed that the negligence of the deceased was conclusively shown, but upon another and wholly distinct ground. The only question, therefore, is, whether the complaint ought to have been dismissed for the reason that was alleged, namely, that the plaintiff had failed to prove that the deceased was free from the negligence which was imputed to him by the answer of the defendants. In other words, had failed to prove a negative. That the evidence, as it stood, was consistent with the supposition that the deceased was free from fault, cannot be denied, while, on the other hand, it must be admitted, that it fell very far short of showing that he certainly was so. The question, therefore, is, whether it is this proof that the plaintiff was bound to give.

We believe that this is the first time that the question as to the necessity of such proof, on the part of the plaintiff, in actions like the present, has been raised in this court, or, indeed, in any court of this state; and, from the frequency of such actions, it is a question of no ordinary importance, and merits an attentive consideration.

It is certainly true, as a general rule, that there can be no recovery in these actions, when it is proved that there was a want of ordinary care, on the part of the person accidentally injured, which directly contributed to the accident; but it by no means follows, that the plaintiff is, in the first instance, bound to show that the person so injured could not have been guilty of the negligence imputed: that is, is bound to prove a state of facts necessarily excluding the supposition of what, for convenience, may be termed his guilt. Yet this, as we understand it, is exactly the proposition that is now contended for. It is exactly the proposition, if the plaintiff, in all these cases, is bound to prove, in order to maintain the action, that there was no want of ordinary care, on his part, or that of the person whom he represents. It is manifest, however, upon a slight consideration, that this proposition, if admitted to be true, is equivalent to saying that, in all these cases, the law presumes, that the negligence of the person accidentally injured contributed to the accident, and that this presumption, unless overthrown by positive evidence, is alone sufficient to defeat a recovery. If such is the law, we are bound so to declare it; but we are unable to see that there is any warrant from reason and good sense, from

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justice, or public policy, for such a presumption. It is, it seems to us, purely gratuitous and arbitrary, and if established by authority, upon principle, is not to be defended. The presumption would be just as reasonable, if not more so, that accidental injuries, in all cases where a compensation in damages is sought, were in reality occasioned, solely by the negligence of the defendant or his servants, so as to entitle the plaintiff to recover merely by proving that the accident happened and the injury followed, and, in all cases casting upon the defendant the burden of repelling the presumption, by demonstrative proof of its falsity. This, however, is a proposition for which no lawyer would willingly contend, and which, assuredly, no court of justice could be expected to sanction. Yet is there, in reality, any difference in the cases? If negligence cannot be imputed to the defendant, but must be proved, can any reason be given why, without proof, it should be imputed to the plaintiff? If the plaintiff, in order to maintain the action, is bound to prove the negligence of the defendant, must it not be just as incumbent upon the defendant to prove the negligence of the plaintiff, in order to bar a recovery? We certainly think so, and, unless the law is otherwise settled, must so decide.

17.7/- But we are told that the law is otherwise settled, and, in proof of the assertion, are referred to the decision of the Supreme Court of Massachusetts, in *Lane v. Crombie*, (12 Pick. 177.) That this decision distinctly affirms the doctrine for which the counsel for the defendants so earnestly contended, cannot be denied; but whether it is alone sufficient to establish that doctrine as law, is a different question. The court, in this case, ordered a second trial upon the ground that, on the first, the Judge had failed to instruct the jury that the plaintiff was bound to prove that the accident by which he was injured was not occasioned by his own want of ordinary care. The court, therefore, decided that the burden of proof was upon the plaintiff, to show that his own negligence was not a cause of the accident, and not upon the defendant to prove that it was; and if this decision ought to govern us, we cannot do otherwise than hold that the complaint, in the present case, was properly dismissed.

But with the utmost respect for the learned court by which this decision was pronounced, we cannot regard it as an authority by which we ought to be governed. Upon the fullest consideration,

we cannot regard it as evidence of the law, that we are bound to declare. It is scarcely necessary to say that the decisions of the courts, however respectable and learned, in our sister states, have with us no binding force as precedents, but are only to be followed so far as they command our assent by the reasons and authorities upon which they are founded. When we cannot reconcile them with our own deliberate convictions, it is our duty to reject them.

The decision of *Lane v. Orombie* was not rested upon argument or analogy, but upon authority alone. No reasons were given to show the propriety or justice of the rule which the court held itself bound to follow, but it was considered as settled by prior decisions, the cases to which the court referred. Those cases are *Butterfield v. Forester*, (11 East. 61,) *Harker v. Hunniston*, (6 Cow. 191,) and *Smith v. Smith*, (2 Pick. 621.) We have examined them all with attention, and find ourselves unable to assent to the interpretation that was given to them by the Supreme Court of Massachusetts. As we understand them, they are very far from justifying the conclusion at which the court arrived. In our deliberate judgment, they prove this, and only this, that when it appears by the evidence on the part of a plaintiff, who seeks to recover damages for accidental injuries, that by the exercise of ordinary care he might have avoided the accident, he is not permitted to recover; but this is wholly different from holding that he is not permitted to recover unless he shows, affirmatively, that there was no such want of ordinary care on his part as could have contributed to the accident. The distinction between the two propositions is manifest. In the first, the negligence which is to bar a recovery is proved; in the second, without proof, it is presumed to have occurred. It is presumed, since that which is not proved can rest only upon a presumption.

It escaped the attention of the Supreme Court of Massachusetts, that in numerous cases—we believe in a majority of those that are reported, in which a plaintiff claims damages for accidental injuries, the fact that his own negligence contributed to the accident, is treated expressly or by implication as purely a matter of defence, the burden of proving which, as in every other case of a defence, necessarily rests upon the defendant. According to our own experience and information, it is this rule, that in practice

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has been constantly observed in the courts of this state, and has been understood by all our Judges to be that which they were bound to follow, and we cannot think that it ought now to be departed from, in deference to a single case in which, upon mistaken grounds, its authority has been denied.

There are other considerations that have strengthened our conviction that it is the rule which we are bound to declare and to follow.

If the plaintiff in every action for accidental injuries, were bound to prove, before his case could go to the jury, that the accident could not have been occasioned by any want on his own part of ordinary care, it is certain, that an allegation in the declaration that there was no such want, would be a material and necessary averment; it would be so, upon the principle that every fact is necessary to be averred which is necessary to be proved, in order to maintain the action, and hence the omission of such an averment would render the declaration bad upon demurrer. It is true, that such an averment is found in some of the precedents of declaration, in the collections of Wentworth and others, but in many more it is wholly omitted, and we are convinced that there is no adjudged case in which it has been held or intimated that such an omission is a valid cause of demurrer. That it is not so regarded there is positive evidence.

For more than thirty years past, the Court of Exchequer in England, has been distinguished for its adherence to the strictest rules of pleading and of evidence, and if there are any errors in the pleadings before them that escape the notice of counsel, they are sure not to escape the zealous vigilance of the Judges. The action in each of the cases of *Gough v. Bryan*, (2 Mees. & Welsb. 760;) and *Bridge v. The Grand Junction R. R. Co.*, (8 Mees. & Welsb. 244,) was to recover damages for accidental injuries, and in each, a plea, which set up, in a defective form, the negligence of the plaintiff as a bar to his recovery, was held to be bad upon demurrer, and judgment, therefore, rendered for the plaintiff; but in neither case did the declaration contain an averment that the accident had happened without any want of ordinary care on the part of the plaintiff, and we may be certain, that had the omission been deemed a fatal defect, it would not have escaped the observation of the counsel or of the court, and would have been so

determined. Had the averment been deemed material—as it certainly would be if the rule of law as to the burden of proof were such as has been adopted in Massachusetts—we do not doubt that the court would, in each case, have rendered judgment for the defendant, instead of the plaintiff, in conformity to the well-known rule, that when a demurrer is interposed, no matter in what stage of the pleadings, judgment must be rendered against the party by whom the first fault in pleading is shown to have been committed.

It is not irrelevant to observe that some of the more recent decisions in England have gone to the extent of holding that the negligence of the plaintiff, even when it is proved to have contributed to the accident, is not, in all cases, a bar to his recovery. In the case of *Davies v. Mann*, (10 Mees. & Welsb. 546,) the act of the plaintiff, which it could not be denied had contributed to the accident that led to the action, was an act, not merely of negligence, but of positive illegality, and yet the defendant, upon the ground that by the exercise of ordinary care he might have prevented the accident, was held to be liable in damages for the injury to his property that the plaintiff had sustained. Comparing the decisions, the doctrine now established in England appears to be this:—that as the plaintiff in the action is not allowed to recover, notwithstanding the clearest proof of the negligence of the defendant, when it so also proved that his own negligence directly contributed to the accident, so the defendant is not shielded from a recovery, notwithstanding such negligence on the part of the plaintiff is proved, when it appears, that but for his own subsequent negligence the accident would never have occurred; that is when it appears that his own negligence was its sole proximate cause. We are not aware that the exact question has yet arisen in our own courts, but we are not prepared to say that the doctrine, although somewhat novel, is not highly reasonable, and whether it may not be applicable to the case before us, is a question that, upon a future trial, may deserve consideration.

As the decision in *Lane v. Crombie* has no adequate support from authority, so it has certainly none from reason or analogy, but, if followed, would introduce an exception from the rules of evidence, unreasonable in itself, as well as before unknown. We know of no rule of evidence that rests upon plainer and surer

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grounds of equity and good sense, than that which in every controversy casts the burden of proof upon the party who maintains the affirmative—which, in other words, requires that he who asserts a fact, necessary to be shown to sustain the action or bar a recovery, shall prove its existence. That there are some exceptions from this rule we do not deny, but these, when examined, will be found to rest mainly upon technical rules of pleading, and as all such rules are now abolished, it may well be doubted whether any exception ought now to be allowed, unless in cases where the law has settled that the right to maintain the action depends upon proof of a negative allegation—and in all these cases, as has already been observed, the negative allegation is an essential averment in the declaration or complaint. So also in actions founded upon contract, an exception may be created by the very terms in which the parties have chosen to express their agreement; but we are unable to perceive that any valid reason for allowing an exception, in any other cases, can now be alleged. Although it may not be universally true that a negative proposition is from its nature incapable of proof, it is certain, that in most cases the proof is difficult, and in some, impossible; and to exact the proof in these would be equivalent to a denial of justice. It would frequently operate to deprive a plaintiff of the compensation to which a jury, upon the whole evidence, might justly deem him to be entitled. And by exacting the proof in actions like the present, founded upon the statute, we are persuaded that the just as well as benevolent intentions of the legislature in favor of the wife and children of every person whose death has been caused by the culpable negligence of others, would, in many cases, be wholly defeated.

We think, for the reasons that have been given, that the judgment dismissing the complaint was erroneous.

It is, therefore, reversed, and there must be a new trial, with costs to abide the event.

WILLIAM A. WHEELER and another v. JOHN A. NEWBOULD.

Proof of a local usage cannot be received to vary the legal construction of a contract, unless it is clearly proved that its existence and terms were known to the parties, and that it was in reference to it that their contract was made.

When there is an implied authority to sell personal property pledged as collateral security for the payment of a debt, the sale to be valid must be public, and be preceded by a demand of payment and by a reasonable notice of the time and place of sale.

But there is no implied authority to sell when the collateral security consists only of the promissory notes of third persons. The only authority which, when the contract is silent, then passes to the creditor, by implication, is to reimburse himself by the collection of the notes, if the debt is unpaid at its maturity.

Held, in the principal case, that a sale made by the defendant of certain promissory notes, placed in his hands by the plaintiffs as collateral security for the repayment of a loan, was void, not only as irregular but as made without authority.

Held, therefore, that the plaintiff was entitled to judgment for the balance collected upon the notes beyond the amount of the loan.

(Before OAKLEY, CH. J., and DUEK, J.)

Heard and decided, June term, 1855.

THE action was brought to recover a sum which was alleged to be a balance due to the plaintiffs, from the proceeds of certain promissory notes, which had been deposited with the defendant as collateral security for the repayment of a loan of \$2,000. The notes, fourteen in number, were set forth in the complaint; they were signed by different makers, amounted in the aggregate to \$2,614.73, and the whole amount, it was averred, had been collected.

The defence substantially was, that the loan for the security of which the notes were pledged, not being repaid when it became due, the defendant, to reimburse himself, sold the notes at private sale for the sum of \$2,020, which was the best price that could be obtained; and the answer averred that the sale was lawfully made according to the custom and usage of brokers and dealers in commercial paper in the city of New York.

There are other issues made by the pleadings, but as these were abandoned upon the trial, it is unnecessary to state them.

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The cause was tried before Oakley, Ch. J., and a jury, in April, 1853; and upon the trial, the plaintiffs, who were admitted to be partners in trade, under the firm of William A. Wheeler & Co., to maintain the issues on their part, gave evidence tending to show that on or about the 6th day of November, 1848, the plaintiffs, through one Jeremiah Hotchkiss, a broker, borrowed from the defendant the sum of two thousand dollars, and as collateral security for the repayment thereof, deposited with the defendants certain business paper, consisting of notes and drafts, taken by the plaintiffs in the course of their business, not then due, to the amount of two thousand six hundred and fourteen dollars and seventy-three cents, and also the check of Wheeler, Wood & Co., upon the American Exchange Bank, in the city of New York, for the sum of two thousand dollars, dated on the 20th day of December, 1848.

That on or about the 21st day of December, 1848, the day after the said check was payable, the plaintiffs caused an offer to be made to the defendant to take up the said loan, and receive back the collateral securities given therefor, and demanded that such collaterals should be given up. That the offer of the plaintiffs was to pay the defendant the sum of two thousand dollars, less the sum of \$176, which they alleged had been deducted as and for interest by the broker Hotchkiss, while the defendant demanded payment of \$2,000 and interest thereon, at seven per cent., from the time the loan was made.

The plaintiffs also proved that all the said notes and drafts, so given as collateral security for the said loan, were paid at maturity, and then rested their case.

The defendant, to maintain the issues on his part, gave evidence tending to prove that on the 20th day of December, the day the said loan matured, the said check of Wheeler, Wood & Co. was presented to the American Exchange Bank for payment, and payment refused. That thereupon the defendant, on the following day, demanded payment of the said loan and interest from the plaintiffs, and gave them notice that unless the loan and interest was paid he should sell the said collateral securities for the best price he could obtain therefor, according to the usual custom and course of business in like cases, in the city of New York, to reimburse himself. That on the 21st day of December, at the time

when the plaintiffs offered to take up the said loan, and at other times, before the collaterals were sold, the defendant offered to give up to the plaintiffs the said check and all the collateral notes and drafts, upon payment to him of the sum of \$2,000, and seven per cent. interest thereon from the time the loan was made.

That the said loan and interest not having been repaid, the defendant, on the 28th day of December, 1848, sold the said notes and drafts, at private sale, to one Frederick L. Yates, for the sum of \$2,020, and that that was the best price offered for them, none of the same having then become due or payable.

It was admitted that the defendant afterwards tendered and offered to deliver to the plaintiffs the said check of Wheeler, Wood & Co., received by him with the collaterals at the time of making the loan.

The defendant's counsel then offered to prove that at the time this loan was made, it was, and long had been, the usage and custom, in the city of New York, to sell notes and drafts, pledged as collateral security for loans, after such loans were due, and within a reasonable time after demand of payment thereof, and notice that such sale would be made in default of such payment, at private sale, for the best price that could be obtained, and not at public sale, or by auction.

The counsel for the plaintiffs objected to such proof, and thereupon the court sustained the objection, and held that such testimony was inadmissible.

To which ruling and decision, the counsel for the defendant did then and there except.

The defendant's counsel then offered to prove that the defendant sold the notes and drafts received by him as security, for the said loan of \$2,000, for their full value, and for the best price that could be obtained therefor at the time of such sale.

The plaintiffs' counsel objected to this proof, and the court sustained the objection, on the ground that the defendant had no right to sell such notes and drafts, either at public or private sale, or at auction, but was bound to hold and collect the same as they became due.

To which ruling and decision, the defendant's counsel did then and there duly except.

The court thereupon charged and directed the jury, that the

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nature of the transaction was, that certain notes and drafts were deposited with the defendant as collateral security, generally, upon a loan of money; that after the loan matured, he gave notice to the plaintiffs that he would sell the same notes and drafts, without specifying any time, place, or manner of sale, to reimburse himself, unless the loan and interest should be immediately paid. He afterwards sold them to Mr. Yates, by private arrangement.

The court further charged and directed that the defendant had no right to do this; that the court understood the right of the defendant to be, and so directed the jury, to hold the said notes and drafts, and collect and receive the money thereon, as it became due, and apply it to the payment of the loan, and return the balance, if any, to the plaintiffs. These notes and drafts were all duly paid at maturity. That in judgment of law, therefore, the plaintiffs, were entitled to a verdict for the excess over and above the amount of the loan and interest, for which they were pledged.

And directed that a verdict be accordingly entered for the plaintiffs, subject to adjustment. To which direction and charge of the court, the counsel for the defendant did then and there duly except. The amount of the verdict was thereupon adjusted by the parties at \$772.41.

The court thereupon directed that the exceptions should be heard, in the first instance, at General Term, and that judgment, in the mean time, be suspended.

E. Ward, for the plaintiffs, insisted that they were entitled to judgment upon the verdict. That the sale of the notes at private sale without notice of the time and place of sale, was illegal, and that the defendant had in truth no authority to sell at all, either at public or private sale, the rule, which applies to other personal property not being applicable to commercial paper. He cited 2 Caines' Cases, 201; 12 John. 146; 4 Denio, 227; 3 Hill, 593; 7 Hill, 297, and other authorities.

E. W. Stoughton, for the defendant, contended that the general rule, that when property is pledged to secure the repayment of a loan, the lender has full power to sell it after a default in payment, and due notice to the borrower, was just as applicable to commercial paper as to any other description of personal property.

That the sale in this case was fully justified by the usage that was offered to be proved, the evidence of which ought not to have been rejected, and that as the Judge had erred in excluding this evidence, a new trial ought to be granted. He cited 1 Caines, 43; 2 John. 327; 6 John. Ch. R. 437; 12 Wend. 866; 19 Wend. 386, and several other cases.

BY THE COURT. DUER, J.—We are clearly of opinion that the plaintiffs are entitled to judgment upon the verdict which the jury was instructed to render.

The usage that was offered to be proved on the trial was confined to this city. It was strictly a local usage, and as the evidence offered went no further than to prove its existence, it was properly excluded. The law may be considered as settled, that proof of a local usage can never be received to vary the construction that the law would otherwise give to a contract, unless it is clearly proved that its existence was known to the parties, and that their contract was made in reference to its terms. (*Goday v. Lloyd*, 3 Bing. 793; *Bartlett v. Penland*, 10 B. & Cross, 760; *Russel v. Bangley*, 4 B. & Al. 368; *Scott v. Irving*, 1 B. & Al. 605; vide 1 Duer on Ins., 263 § 57, and note § 1, p. 286, where cases collected.) Chancellor Walworth, indeed, in the case of *Allen v. Dyckers*, in the Court of Errors, (7 Hill, 497,) seems to have held that a usage of the Brokers in Wall street can never be given in evidence when opposed to the general law of the state, but he probably meant only to say, that such a usage does not bind the parties merely by its existence, without proof that they intended it should govern their contract. We do not doubt that a local usage is just as binding as a general, when it appears with sufficient certainty that it was in the contemplation of the parties when they made their contract. In such a case, it becomes a part of their agreement, with the same effect as if incorporated in terms. In the case before us, there was no offer on the part of the defendant, to show that the alleged usage was known to the plaintiffs, nor, consequently, that they meant to be bound by it. The offer, as made, was, therefore, properly rejected, as insufficient and irrelevant.

The usage being out of the case, the right of the plaintiffs to recover is not at all doubtful, even upon the supposition that a

pledge of promissory notes, or other securities for money, stands on the same ground, as a pledge of stocks or merchandise, and carries with it the same authority to sell the property, in the event of a default in the payment of the debt, it was intended to secure. When the contract is silent, as to any such authority, it is certain that a sale binding on the debtor can only be made after payment of the debt has been demanded, and reasonable notice of the time and place of sale has been given; this last condition evidently implying that, in all cases, the sale must be public. (*Cortelyou v. Lansing*, 2 Caines' Cases, 200; *Allen v. Dykers*, 3 Hill, 593; S. C., 7 Hill, 497; *Stearns v. Marsh*, 4 Denio, 227; *Brownell v. Hawkins*, 4 Barb. 491; *Wilson v. Little*, 2 Comst. 443.) In the present case, a demand of payment was proved, but the sale was made without any notice of time and place, and was private. There was, indeed, a general notice of an intention to sell, but it would be extravagant to suppose, that such a notice, without any designation of time or place, is that which the law requires. It was plainly insufficient and ineffectual. The sale, therefore, although it may have passed a title to the purchaser, was, in respect to the plaintiffs, unauthorized and void; and, consequently, the liability to them of the defendant is exactly the same that it would have been, had he retained the notes and collected the amount of each, as they severally became due.

What we have now said would suffice for the decision of this case, but it is not our intention to pass over the far more important and interesting question, which the bill of exceptions distinctly presents, and to which the arguments of the counsel before us were principally directed, namely: whether the general rule that a creditor has an implied authority, where the contract is silent, to sell the property pledged to him as collateral security, if the debt remains unpaid, is applicable, not only where the pledge consists of stocks or merchandise, but equally, when it consists of promissory notes, or bills of exchange, or other choses in action; or whether, in respect to these, the authority implied is not limited to the collection of the securities, and the use of the necessary means to enforce their payment? That such, in these cases, is the only authority that can be implied, was the opinion of the Chief Justice upon the trial, and it was mainly upon this ground that he directed a verdict for the plaintiff. He adheres to this opinion; and, after some

hesitation and doubt, I concur with him in holding that it is a true expression of the law that we are bound to declare.

Although the broad terms in which the general rule is laid down, both by Chancellor Kent and by Mr. Justice Story, (2 Kent's Com. pp. 582-3; Story on Bailments, § 310,) seem to warrant the inference that the authority of the pledgee to sell is coextensive with the power of the debtor to create the pledge, and consequently embraces every species of property which is a legitimate subject of the contract, it is, nevertheless, certain that there is no reported case in which the doctrine has been carried to this extent. There is no adjudication that a sale by a pledgee of evidences of debt, created by individuals, can be justified, otherwise than by an express authority; and when we inquire into the reasons upon which the modern rule is founded, and by which alone it can be defended, it will at once be seen, that to a sale of this character they are wholly inapplicable, and that by sustaining an authority to make the sale we should open a wide door to imposition and fraud.

In all cases, when personal property is placed in the hands of a creditor as a collateral security, it is a very reasonable presumption that the parties intend that, in the event of a failure on the part of the debtor to meet his engagement, the property shall be applied, in some form, to the satisfaction of the debt. They mean, that out of or by means of the property, the loan or advance for which it is pledged shall be reimbursed; and it is obvious, that where the property consists of stocks or merchandise, it is only by a sale that it can be made available to the purpose intended. Hence, in these cases, the authority of the pledgee to sell is founded, not on an arbitrary rule, but upon the actual intention of the parties, as deduced, not merely from the nature of the contract, but from that of the property which it embraces. And it is evidently upon this ground that Chief Justice Gibbs, in *Pothonier v. Dawson*, (1 Holt, N. P. R. p. 385,) placed his decision, (Story on Bail, § 311.)

And here I cannot refrain from remarking that, so far as I have been able to discover, *Pothonier v. Dawson* is the only case to be found in the English books in which the implied authority of a pledgee to sell, without resorting to a court of equity, has been judicially asserted. I am aware that there are other cases which are usually referred to, as having introduced and established the doctrine, and these are *Tucker v. Wilson* (3 P. Will, 261 S. C. 1

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Brown, P. Ca. 494) and *Lockwood v. Elver* (2 Atk. 308;) but it is remarkable that, in each of these cases, the contract was, upon its face and by its necessary legal construction, a mortgage and not a pledge, and this Chancellor Kent, in his opinion in *Hart v. Van Eyck*, expressly admits (2 John. Ch. R. 100, vide also *Cortelyou v. Lansing*, 2 Caines' Cases, 210.) I mention these facts, as proving that the doctrine of an implied authority rests more upon a general usage, which, in respect to stocks and merchandise, is well known, and has long prevailed, than upon any decisions of controlling authority. It ought not, therefore, it seems to us, to be extended by construction to any cases which the usage, as general and known, has failed to embrace. In the very elaborate and learned opinion which was prepared for delivery by Chancellor Kent, as a Justice of the Supreme Court, in *Cortelyou v. Lansing*, but was never, in fact, delivered,* he speaks of a sale by a pawnee after notice, as a practice which then prevailed "in cases of the transfer of stocks," (2 Caines' Cases, 212,) and was evidently of opinion that it was to such cases that the practice and the authority were confined.

It is certain, indeed, that, by the ancient rules of the common law, a sale of a pledge could only be made under and in pursuance of a judicial sentence, and that it was only by force of such a judicial sentence that the right of the pledger to reclaim could ever be barred, (2 Caines' Cases, pp. 204, 205; Story on Bail, §§ 210, 246.) And when we reflect upon the security against abuse and fraud which these rules certainly afforded, we may be disposed to regret that they have ever been relaxed; but if the modern doctrine, that the pledgee has an election, to resort to a court of equity or to sell *ex suo motu*, be confined to sales of merchandise and stocks, under the conditions already named, it seems that there is very little reason to fear that the interests of the debtor will not be sufficiently protected. As stocks and merchandise have, at all times, a known market value, if they are sold at public auction, and after due personal notice to the debtor, it is not probable that

* In *Barrow v. Paxton*, (5 John. 260,) when *Cortelyou v. Lansing* was referred to, by the counsel for the defendant, as a decision of the court, Kent, Ch. J., said: "That case was never decided by this court. It was argued once, and I had prepared the written opinion, which appears in the report of Mr. Caines, but the court directed a second argument, which, for some reason, was not brought on, so that no decision took place."—(R.)

he will sustain any loss that would not have occurred had the sale been judicial, while, at the same time, he is relieved from the expenses that would necessarily attend a judicial proceeding. It is, doubtless, because experience has shown that such are the facts, that the usage of a sale, in these cases, by the mere act of the pledgee, has become established, and that the sanction of the courts has been given to the practice.

It follows from these observations, that the reasons by which alone the doctrine that a pledgee has an implied authority to sell, where the contract is silent, can alone be justified, and upon which we are therefore bound to suppose that it is in reality founded, are: first, the necessity of a sale, as the only means of obtaining a satisfaction of the debt; and next, the probability that by a sale properly conducted, the rights and interests of the debtor will not be sacrificed; nor can it be denied, that where these reasons exist, the intention of the debtor to clothe the pledgee, with the requisite authority, may be reasonably and safely inferred.

It is manifest, however, that neither of the reasons that has been stated can be said to exist when the pledge consists solely of the personal securities of individuals, and hence, it seems to us, that, in such cases, no court can be warranted to infer the existence of a similar intention. It is true that the same presumption exists in these, as in all other cases, that the parties intend that the pledge shall be applied to the satisfaction of the debt, but this presumption is far from justifying the belief that the debtor contemplated, and meant to authorize, a sale. It cannot be said, that a necessity for a sale exists in order to furnish the means of satisfying the debt, since those means are furnished by the securities themselves, and will result from that, which the parties doubtless anticipate, their actual payment as they become due; and as the personal obligations of private individuals, with rare exceptions, can have no market value, it is certain that a sale, whether public or private, before they reach their maturity, will involve a large sacrifice of their true value, and entail a heavy loss upon the unfortunate debtor, and of this the very case before us affords a striking example and proof. It is, therefore, not reasonable to believe that the debtor, in creating the pledge, meant to confer an authority, the exercise of which he must have known would be attended by these consequences, and which the object

to be answered—the reimbursement of the creditor—would not require. On the contrary, the reasonable presumption is, that he meant to give no other or larger authority than would enable the pledgee to use the property for the purpose intended—the satisfaction of the debt—and, therefore, meant to give no other authority than that of collecting the amount of the securities from the parties liable, and of adopting the necessary means of enforcing payment; and it is this conclusion, we are convinced, that a just regard to the nature and object of the contract, the protection of the debtor, and the intentions of the parties, requires us to adopt. It may be that the doctrine, that has been contended for, of an unlimited discretion to sell, would better suit the interests, and correspond with the usage of brokers; but as a learned senator observed in *Allen v. Dykers*, the usages of brokers are not always in perfect harmony with the interests of their employers, or with the rules of justice and sound morality.

The only reported cases we have found in which a promissory note has been the subject of a pledge, are *Garlick v. James*, (12 John. 146;) and *Bowman v. Wood*, (15 Mass. 524,) and in each, the language of the court certainly implies, although we will not say that such was the decision, that the only authority of the pledgee is to receive the amount of the note from the party liable.

In holding, as we do, that a pledge of *choses in action*, created by private individuals, and having no market value, has not an implied authority to sell them, we are not to be understood as saying that a sale may not, under special circumstances, be decreed by a Court of Equity. We decline, however, to express or intimate an opinion upon a question, which is not before us, and which, when it arises, will demand a serious consideration.

There must be judgment for the plaintiffs for the sum found by the jury, with costs.

JOHN RUSSELL v. THE HUDSON RIVER RAILROAD CO.

The rule that a servant or agent cannot sustain an action against his employer for an injury sustained by reason of the negligence of another servant or agent in the common employment, does not apply to the case of a day laborer, whose contract is only from day to day, and who, by arrangement of the company, is carried to and from his work.

In such a case, if an injury occurs from the exclusive fault of an engineer of the train to such a laborer on his passage from his work, the company will be liable. The laborer is not then in the discharge of any service which his contract with the employer imposes upon him.

Quere, if the rule is applicable where the employment of the injured servant is wholly distinct from that of the one doing or causing the injury.

(Before DUM, BOSWORTH and SLOSSON, J. J.)

October 1, 27, 1855.

CASE upon a verdict for the plaintiff for \$225, subject to the opinion of the court, on a case to be made to be heard in the first instance at General Term, with liberty to either party to turn the same into a bill of exceptions, or case containing exceptions, and with liberty to the court at General Term to dismiss the complaint, if of the opinion that no action would lie on the facts proved.

The action was, to recover damages for injuries sustained by the plaintiff from being thrown between two cars, in consequence of the train being precipitated into Spuytendevl Creek. The complaint alleges, that the cars were run at a dangerous rate of speed on a curve; that the engineer had not the requisite skill, of which the defendants were aware, and was of a rash disposition, and that such unskilfulness and rashness caused the accident, from which he received great bodily injury, and was put to large expenses.

The plaintiff was in the employ of the defendants, and had been working at a gravel-pit on the day of the accident. He was on a platform car, on his return to the city, after his day's work. The custom was to carry the workmen who lived in the city to their work, and bring them back to that place, without a charge.

Considerable testimony was produced, as to the cause and nature of the accident and the negligence of the engineer, which, from the points decided it is needless to state.

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It appears that there was no other engagement between the plaintiff and the company than that of a workman from day to day.

The defendants moved for a nonsuit, on the ground that the plaintiff was in the employ of the defendants, and that the injury was occasioned by the negligence of another employee of the company.

This application was denied, and the defendants excepted.

The defendants' counsel then requested the Judge to charge the jury to the same effect. This was refused, but the Judge stated that any verdict which the jury might render, if in favor of the plaintiff, would be taken subject to the opinion of the court, as to whether the defendants were liable to the plaintiff, he being in the employ of the company at the time of the accident.

The Judge then charged the jury—

First. That the plaintiff was not entitled to recover for his injuries from the accident in question, unless it arose from the negligence of the engineer, without any negligence on his own part occurring to produce the injury. That there seemed to be no doubt the injury was caused by the negligence of the engineer.

Second. That the plaintiff was only entitled to recover his actual damage, such as the expense of medical attendance and medicines, and for loss of time and personal suffering, and such as might result from the permanent nature of the injury, if any; but not any exemplary damages, unless the jury believed that the engineer was incompetent, and the officers of the defendants knew of, or had reason to suspect such incompetency.

To such instructions the plaintiff's counsel excepted, and requested the Judge to charge—

First. That if the jury found that the plaintiff was, at the time of the accident, not in the employ of the defendants, he was entitled to recover.

Second. That if the plaintiff was not engaged or employed in that branch of defendants' business which consisted of the running of cars, engines, or trains, the defendants were liable.

The Judge refused so to charge, and the plaintiff's counsel excepted.

A verdict was then found for the plaintiff, as before stated.

W. A. Robertson, for the plaintiff.

W. Fullerton, for the defendants.

BY THE COURT. DUER, J.—It cannot be denied that the decision of the Court of Appeals in the case of *Coon v. the Syracuse and Utica R. R. Co.*, (1 Selden, p. 492,) has established the law that a servant or agent cannot maintain an action against his employer for injuries sustained by him, through the negligence of another servant or agent engaged with him in the same common employment, and if this rule were applicable to the present case, it would be our plain duty to dismiss the complaint. But we are clearly of opinion that the rule is not applicable, since, as we understand the facts of the case, the plaintiff was not in the employ of the defendants when, through the negligence of their engineer, the accident happened by which he was injured. It appears from the evidence, and was admitted upon the argument by the counsel for the defendants, that the plaintiff was employed by the day, and when the work of each day was performed, was under no obligation to return on the following. There was a separate contract, therefore, for each day, and it was a part of this contract that when the day's work was over, the plaintiff should be transported in the cars of the defendants, without charge, to his residence in this city. When the accident happened, the plaintiff had performed his day's work, had done all that he was bound to do, and the defendants, in the execution of their contract, were transporting him to his residence. Hence, although the contract between the parties, not having been fully performed by the defendants, was not terminated, it seems to us manifest that the relation between them of master and servant, which the contract created, had wholly ceased, since there were no longer any services, which the defendants had a right to exact and the plaintiff was bound to render. His taking passage in the cars was not in the discharge of any duty which he owed to the defendants, and in the discharge of which he was subject to their authority. It was as much a voluntary act as in the case of an ordinary passenger, and as he had paid for his passage by the work he had performed—(for his free transportation was a part of his day's wages)—we see no reason to doubt that his rights were in all respects the same as those of an ordinary pas-

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senger, and, consequently, the defendants just as responsible for any injuries which, through the negligence of their servants, he might sustain. To sustain the defence, we should be obliged to hold that the relation of master and servant continues, even when the servant has performed all his stipulated work, so long as any part of his stipulated wages remains unpaid; a proposition which, when thus stated, the learned counsel for the defendants readily admitted could not be maintained.

The case before us is, therefore, widely distinguishable from the recent case in the Supreme Court of Pennsylvania, to which we were referred, (*Ryan v. Cumberland Valley R. R.*, Law Mag., April, 1850, p. 253,) for in that case, the very ground of the decision was, that the plaintiff, when he sustained the injuries for which the action was brought, was in the actual employment of the defendants, and in the discharge of a duty which his contract of service imposed on him.

Placing our decision upon the ground that when the cause of action occurred, the relation between the parties, which is set up as a defence, no longer existed, we deem it unnecessary to consider the other questions that were raised and discussed upon the hearing. We think, however, with Mr. Justice Gardiner, that it may reasonably be doubted, whether the rule, that exempts the common employer from all liability, can be justly applied, when the employment of the servant, who is injured, is wholly distinct from that of the servant by whose negligence the injury was occasioned, (1 Selden, p. 495.) The decision in the Court of Appeals leaves this an open question.

The plaintiff is entitled to judgment upon the verdict, with costs.

LOUIS NEWSTADT v. ALVIN ADAMS and others.

In an action against the carriers of goods by express, to recover the value of a diamond pin, received at New York, to be delivered at Philadelphia, the fact that the complaint states a delivery to the carriers at 59 Broadway, while the proof is of a delivery at an office in Canal street, is no obstacle to a recovery. The variance is immaterial. So is the omission to state, as a part of the carrier's contract, that he was not to be liable for any loss or damage, unless proved to have occurred from his fraud, or gross negligence. In such a case, proof of the delivery and acceptance of the goods to be carried, of a demand of them at a proper time and place, and of a refusal to deliver them, without explanation, is sufficient, in the first instance, to entitle the plaintiff to recover.

It is only when an actual loss is shown, that a plaintiff, under such a contract, is bound to prove that the fraud or gross negligence of the carrier, caused the loss. When the contract limits the liability to \$150, unless the nature and value of the property are disclosed when delivered, to the carrier, the plaintiff, *prima facie*, cannot recover beyond that sum, though the property is clearly proved to be worth more.

(Before DUNK, BOSWORTH and SLOSSON, J.J.)

October 1, 1855.

THIS action was tried before Ch. J. Oakley, and a jury, on the 19th of March, 1856. A verdict was taken for the plaintiff by direction of the Judge, for the sum of \$175, subject to the opinion of the court, at general term, upon a case, with power to the court to reduce the verdict to \$150, should it think proper.

The defendants were partners, carrying on the express and forwarding business between New York and Philadelphia. The complaint alleges that on the 10th of December, 1854, a box was delivered to the agent of the defendants, at their office, No. 59 Broadway, in New York, to be delivered to the plaintiff in Philadelphia, to whom it was directed. A receipt was given, signed by one Griffin, the agent. The box contained a diamond ring of the value of \$175. The box was a small flat one, about two and a half inches long, made of paper, and had paper around it. It was delivered at what was alleged to be an office of the defendants, in Canal street. A receipt was given at the time, which is in the following form:

Newstadt v. Adams.

ADAMS AND CO.'S

GREAT EASTERN, WESTERN, AND SOUTHERN PACKAGE EXPRESS.

NEW YORK, *October 16th*, 1854.

Adams and Co., No. 59 Broadway.

Received of EMILIA NEWSTADT, in apparent good order, to be transported by our Express Lines, the undersigned articles, marked as per margin, which we promise to deliver in like order, subject to the agreement now made, and hereafter expressed, to *Louis Newstadt*, at Philadelphia, Pa. It is agreed, and is part of the consideration of this contract, that we are not to be responsible for any *loss* or *damage* arising from the dangers of Railroad, Steam, or River navigation, leakage, fire, or from any cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of ourselves, our agents, or servants, and we are in no event to be liable beyond our route, as herein receipted. Valued under \$150, unless herein otherwise stated.

Freight to

MARKS.	PACKAGES.
Louis Newstadt, Philadelphia, Pa. To be called for.	Little box, to be left at Adams' Express, for the proprietor. GRIFFIN.

Griffin, who signed the receipt, was an agent of the defendants. They had an office in Canal street, where articles were received, and from which they were taken to the office 59 Broadway. This was for the accommodation of up-town people, and packages were received there when the goods were of small value. The agent's orders were, not to take articles at that office of over the value of \$150, nor any money. He was authorized to sign receipts of the character of that produced, for packages of small value to go to the lower office. Nothing was paid to Griffin the agent, at the time, for carrying and delivering the package, or agreed to be paid. Nothing was said at the time of the value of the box. The agent states he would not have taken it if apprised of its value. He supposed from its appearance it was not valuable, and did not make any inquiry as to it. It was the custom to receive packages at the office in Canal street, and send them by the drivers to that in Broadway.

The defendants, when the plaintiff's testimony was closed, moved for the dismissal of the complaint on the ground that no delivery of the box, as alleged in the complaint, had been proved; and that there was no proof of compensation or hire for carrying the box, paid or agreed to be paid by the plaintiff to defendants, that the complaint did not allege the defendants to be common carriers, and that no negligence had been shown on the part of the defendants.

The Chief Justice refused the motion, and the defendants' counsel excepted.

The defendants offering no evidence, a verdict was directed, as before stated.

The other facts sufficiently appear in the opinion of the court.

L. S. Ashley, for plaintiff.

J. G. Vose, for defendants.

BY THE COURT. BOSWORTH, J.—The complaint states, and the answer does not deny, and therefore admits, that the defendants were partners, and as such, were "carrying on the express and forwarding business between the cities of New York and Philadelphia." They were common carriers.

When they took goods in the ordinary course of their business, to be carried from one of those cities to the other, in the absence of any special contract, the implication of law would be, that the defendants were to be paid the usual and customary compensation.

If the defendants received the goods and undertook to carry them, although they were paid nothing, nor promised any thing for doing it, they would be bound to use, at the least, as much care and skill as they stipulated for in the written contract.

The fact that they were delivered to the defendants at Canal street, instead of Broadway, is a variance which the court is required by section 169 of the Code to disregard.

The objection that the legal effect of the contract proved, varied from that described in the complaint, does not appear to have been taken at the trial. Neither was the objection taken that the complaint did not allege any fraud or gross negligence of the defendants. It is too late to take such objections now. (*Barnes v. Perine*, 2 Kernan, 24, 25.)

The objection taken was, that no negligence had been proved. Proof of a delivery and acceptance of the goods to be carried, and of a demand of the goods and non-compliance with it, without any explanation or apology, was sufficient proof of fraud or gross negligence, until some evidence of care or fidelity had been given by the defendants.

As the case presents the facts, the defendants received the goods and undertook to carry them. They stipulated that they should not be charged for any loss or damage unless caused by fraud or gross negligence, and that the plaintiff should be required to prove fraud or such negligence in order to be entitled to recover. The defendants, if made liable, agreed to pay whatever might be shown to be the value of the property; such value, at all events, to be deemed less than \$150. The plaintiff has demanded the goods at the place at which the defendants have agreed to deliver them; and they have not complied with the demand, nor assigned any reason or excuse for their failure to do so.

If the contract had been set out according to its legal effect, as evidenced by the paper signed by Griffin, no other proof of fraud, or gross negligence, could well have been given, than such as was furnished in this case.

When the defendants admit, or it is proved, that they took the goods, and agreed to carry and deliver them at a place named, and they admit that they did not carry and deliver them there—and the only question is, whether their default results from fraud or misconduct, if it appears that the plaintiff called at the proper place and demanded his goods, and the defendants refused to deliver them, without explaining or apologizing for their conduct, the plaintiff would seem to have given all the evidence of fraud or negligence that should be required in the first instance.

Frankness and good faith require that carriers, under such circumstances, should give some explanation of their conduct: It is known to themselves, and cannot be presumed to be known to the plaintiff. It is easy for them to state the cause of the loss or injury, and thus enable a plaintiff to examine into the truth of their statements.

But when they refuse to deliver the goods, and fail to suggest any ground for such refusal, or to give any explanation of their conduct, I think a plaintiff has proved enough, unexplained, to

make a *prima facie* case of fraud or gross negligence. (*Beardslee v. Richardson*, 11 Wendell, 25; Angell & Ames on Carriers, § 38, n. 4, ed. of 1851.)

The defendants did not object that they were not required by the pleadings to come prepared to try the question whether their conduct had been fraudulent or grossly negligent; but the objection was, that no evidence of such conduct had been given.

The main question was, whether the defendants had undertaken to carry and deliver the goods, and had broken their contract.

They did agree to carry and deliver; but the evidence disclosed that this agreement was subject to the further agreement, that the plaintiff should have no claim on them for loss or damage, unless he proved that such loss or damage was caused by their fraud or gross negligence.

The plaintiff gave all the proof that this condition required. If the defendants had objected that the complaint contained no averment of fraud or gross negligence, the court might have ordered an amendment at the trial.

All that the complaint alleged was proved. The most that can be said is, that the agreement produced required the plaintiff to prove more, in order to recover, than he had averred. To this it may be answered, that such proof was given. The defendant did not object that the plaintiff could not give the proof because he had not alleged the fact, but that he had failed to give the necessary proof. If he was mistaken as to the effect of the evidence, as we think he was, the objection made is untenable. There are no variances between the pleadings and proofs, which should not, under the circumstances, be disregarded. (Code, §§ 169 and 170. 2 Kernan, 24-25.)

There is another consideration which is fatal to the defence. The complaint does not allege, nor was there any evidence tending to show, that the package was actually lost. The complaint states that the defendants received the package, and undertook to carry it and to deliver it at Philadelphia. That a delivery has been demanded there, and at the office of the defendants in New York, and that they have wholly neglected and refused, and still refuse to deliver it.

To make the qualifying clause of the contract available to the defendants, after the plaintiff had proved the case stated in the

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complaint, it was incumbent on the defendants to give evidence tending to show that it was lost, or that they were not able to deliver it, in consequence of its destruction, or of its being placed beyond their control by some casualty arising "from the dangers of railroad, steam, or river navigation, leakage, fire, or some other cause."

Then it would be the duty of the plaintiff to show that the cause of the loss, destruction, or other disability of the defendants to deliver, occurred from the "fraud or gross negligence of the defendants, their agents, or servants."

But it cannot be pretended that the plaintiff cannot recover, for a refusal to deliver the article, if the defendants have the power to deliver it. Neither the complaint, nor the answer, alleges a loss of the package, nor any inability of the defendants to deliver it.

It was not suggested on the trial that it had been actually lost.

The concluding part of the contract is inoperative, except in case of an actual loss of the package. When the proof shows a loss of it, that answers the plaintiff's claim, until he gives proof that the loss resulted from fraud or gross negligence.

As the case is presented to us, it is simply a case of a refusal to comply with a demand, made in due form, at the proper place, to deliver the package. The refusal is not accompanied by any explanation. No suggestion was made that it was lost. The case, therefore, as far as the rights and liabilities of the parties to this action are concerned, is the same, as if this qualifying clause was out of the contract. There is nothing in the facts of the case on which it can operate. (*Hearn v. The London and South-Western Railway Co.*, 29 Eng. L. and Eq. R. 494.)

There must be a judgment for the plaintiff; but, as the value of the property was not disclosed, the verdict must be reduced to \$149.99.

Judgment accordingly for plaintiff, with costs.

WILLIAM B. FISH v. JAMES FERRIS, JR.

Where a person hires a horse to go a fixed distance, and goes beyond it, the act is, in judgment of law, a dispossession of the owner, and a conversion of the property to his own use.

Hence, when an action for damages is brought by the owner, as it is founded, not upon a breach of the contract of hiring, but upon the unlawful conversion, infancy is no defence.

New trial ordered, upon payment of costs.

(Before DUEK, BOSWORTH and SLOSSON, J.J.)

October, 1855.

CASE, upon the verdict of a jury for the plaintiff, subject to the opinion of the court at General Term. All the material facts are stated in the opinion of the court.

Mr. Allen, for the plaintiff.

Mr Aiken, for the defendant.

BY THE COURT. SLOSSON, J.—The action is brought to recover the value of a horse, alleged in the complaint to have been hired by the defendant, on the 5th of July, 1854, of the plaintiff, a livery-stable keeper in the city of New York, to go from the city of New York to Flushing in Queen's county, and to no other place whatever; and the allegation is, that the horse was driven to Jamaica, without the permission of the plaintiff, and thus converted to the defendant's use. The defendant, by his answer, denies the specific hiring and conversion of the horse mentioned in the complaint, but alleges that he hired the horse generally, and that he died whilst he was being used with ordinary care, and without any fault on the part of the defendant, but from defects in the animal himself. He then sets up infancy, as a distinct defence, and submits his rights to the court.

The jury were directed to find the value of the horse; and a verdict fixing the value was taken, subject to the opinion of the court.

D.—V.

There is no doubt that where the goods of one person are intrusted to another, for a particular purpose, a misappropriation of them is a conversion, and trover lies. This has been held in the case of the misapplication of a note. (*Murray & Ogden v. Bowling*, 10 J. R. 172.)

So trover will lie where a party hires a horse to go a fixed distance, and goes beyond it. The act is, for the time being, a dispossession of the plaintiff of his right in his horse, and an assumption by the defendant of a right to use him as his own, and this is a conversion. These principles are recognized in *Sargeant v. Blunt*, (16 J. R. 74.)

The evidence, however, leaves the exact nature of the contract extremely doubtful. Whether it was a hiring of the horse to go to Flushing by the shortest and most direct route, without liberty of diverging, and to the exclusion of all other places, or was a hiring by the day, for the general object of a trip to Flushing, but without restriction of route, is a question left very much in doubt. The plaintiff, therefore, fails clearly to make out a case of conversion, and there should be a new trial, but as the defendant seems to have tried the case on the assumption that the contract was as said, viz., a hiring of the horse to go to Flushing and no other place, and as he seems to have relied solely upon the defence of infancy, treating the action as one founded on a breach of contract, to which infancy would be a perfect defence, we think he should pay the costs of the trial.

Had the plaintiff proved that the hiring was for the purpose of going to Flushing by the most direct route, then going by way of Jamaica would have been a wilful act on the part of the infant, which would have disaffirmed the contract of hiring, and made him a trespasser. The contract of hiring was voidable at his election, and a wilful departure from it was an election to avoid it. From the moment an infant becomes a trespasser, his plea of infancy fails him, and I do not see why the plaintiff would not have been entitled to recover in this action, notwithstanding the defendant's infancy, and notwithstanding there was a contract of hiring, had his proof established the contract as laid in the complaint. (*Campbell v. Stakes*, 2 Wend. 139; *Veese v. Smith*, 6 Cranch, 226.)

There must be a new trial, on payment of costs.

FRANCIS O'BRIEN, surviving Executor, &c., of JAMES WHITTY, deceased, v. NICHOLAS MOONEY, ALEXANDER H. MOONEY, and MELISSA KEENAN.

J. W., by his last will and testament, devised a house and lot, in the city of New York, to his executors, in trust, to pay over the rents &c., to his father during his life, and after the death of his father, to pay out of the income an annuity of \$300 to his mother, during her life, and the residue to his sister M. M. B. After the death of his mother, to pay the whole income to his sister during life, and after the decease of his father, mother and sister, to pay the income to the three children of his sister, A. H. M., N. M., and M. M., as soon as the youngest of them should attain the age of 21, during their lives. After their death, and as soon as the youngest child of any of them should attain the age of 21, to sell the property, and divide the proceeds among the children of the children named in the will, in certain specified proportions.

Held, that the devise to the executors was either, as an entirety, wholly void, or was valid only during the lives of the father and sister of the legatee, and that, upon either supposition, the children of the sister became entitled, upon her death, as her heirs-at-law, to the house and lot, as tenants in common in fee.

(Before DUNE, BOSWORTH and SLOSSON, J.J.)

October term, 1855.

THIS was the submission of a controversy under § 372 of the Code. The parties to the submission were the surviving executor and trustee, under the last will and testament of James Whitty, deceased, and the three children, mentioned in his will, of his sister Mary Mooney.

The following are the material facts stated in the written submission, signed by the parties.

James Whitty made and published his last will and testament in due form of law, dated February 5, 1834, and also a codicil thereto, dated 6th February, 1834, which will and codicil are as follows, viz:—

In the name of God, Amen: I, James Whitty, of the city and state of New York, being at present weak in body, but of sound and disposing mind and memory, do make, publish, and declare this instrument to be my last will and testament, as follows, to wit:—

First. It is my will, and I do hereby order and direct, that all my just debts and funeral and testamentary expenses be paid and

discharged by my executors hereinafter named, within a reasonable and convenient time after my decease.

Second. I give, devise, and bequeath unto my executors hereinafter named, and the survivor of them, my house and lot, known and distinguished by the number 244 Water street, in the city of New York, upon the trusts and condition following:—First: To pay out of the rents, issues, and profits arising therefrom, all taxes and assessments against the same, and also such sum or sums of money as may be necessary to effect insurance upon the said house against loss or damage by fire, and as may be necessary to keep the same in sufficient repair. Second: To pay the whole of the net annual income of said house and lot unto my father, Nicholas Whitty, of the city of New York, for and during the term of his natural life; and at the decease of my said father, then to pay unto my mother, Melissa Whitty, should she at that time be living, for and during the term of her natural life, the sum of three hundred dollars per annum, in equal quarter-yearly payments, and the balance of the said net annual income unto my sister, Mary Mooney, widow of Alexander H. Mooney, for and during the term of her natural life.

Third. At the decease of my said mother, I direct my said executors to pay unto my said sister, Mary Mooney, should she at that time be living, the whole of the said net annual income for and during the term of her natural life; and in the event of the death of my said sister before she would become entitled to receive the said income, then I direct my executors to invest the same in such manner as they, in their discretion, may deem most advantageous for my estate, for the benefit of the children hereinafter mentioned of my said sister.

Fourth. After the decease of my said father, mother, and sister, I direct my said executors, and the survivor of them, to pay to Melissa Mooney, Alexander H. Mooney, and Nicholas Mooney, the children of my said sister Mary, so soon as the youngest of them shall arrive at the age of twenty-one years, but not before—yearly and every year during their natural lives—to each of them an equal third part of the said income arising from and out of the said house and lot; and in case that either the said Melissa Mooney, Alexander H. Mooney, and Nicholas Mooney should depart this life, either before or after the decease of my

said sister leaving a child or children, then I order and direct my said executors, and the survivor of them, to apply such share of said rents, issues, and profits, as would have been paid to such parent or parents, if living, of such child or children, for the support, maintenance, and education of such child or children; and after the decease of the said above named children of my said sister, and so soon as the youngest child or children of them shall have attained the age of twenty-one years, but not before, I direct my said executors, and the survivor of them, to sell and dispose of the said house and lot number 244 Water street, either at public auction or private sale, as they in their discretion shall deem best; and the proceeds of the sale to divide in the following proportions, namely: To the child or children then living of the said Melissa Mooney, one-third part thereof; to the child or children then living of the said Alexander H. Mooney, one other third part thereof; to the child or children then living of the said Nicholas Mooney, the remaining third part thereof. But in case that either the said Melissa Mooney, Alexander H. Mooney, or Nicholas Mooney should depart this life without leaving a child or children, in that event the part or share of the proceeds of the sale of said house and lot, which would have belonged to such child or children, had he, she or they survived, his, her, or their said parent, shall belong and be paid to the survivors, in the proportions above mentioned.

The residue of the will, and the codicil, are omitted, as having no bearing upon the questions to be decided.

The testator died March 19, 1834; his father, mother, and sister, and the children of the sister named in the will all surviving him. He had no other near relatives. The father died in July, 1838; the mother, in November, 1852; and the sister, the mother of the defendants, in July, 1841. Melissa, one of the defendants, intermarried with John Keenan, who died in May, 1850.

The questions were, whether the legal estate was in the plaintiff, as surviving trustee, or in the defendants, as heirs-at-law of their mother; and from what time, if at all, the plaintiff was bound to account to the defendants for the rents and profits received by him.

———, for plaintiff, the trustee.

O'Brien v. Mooney.

F. Byrne, for the defendants.

BY THE COURT.—Whether the devise in trust to the executors ought to be regarded, according to the principle of the decision of the Court of Errors in *Coster v. Lorillard*, (14 Wend. 265,) as an entirety and as such, wholly void, is a question which it is unnecessary to decide, since it is certain that the devise, if valid at all, was only so, during the lives of the father and sister of the testator. The estate of the trustees necessarily ceased upon the death of the sister, as its continuance during the lives of her children, the defendants, would suspend the power of alienation beyond the period allowed by the statute, that is, beyond two lives in being at the death of the testator. All the trusts in the will limited to take effect after the death of the sister are very plainly illegal and void. It follows, that as the reversion in fee was undisposed of by the will, it descended, upon the death of the testator, to his father; upon his death, to the sister, as heir-at-law of the father, and upon her death, to the defendants as her heirs; and as the estate of the trustees terminated at the same time, it vested in them, not as a reversion, but as an immediate and absolute fee. The result is exactly the same, upon the supposition, that the devise to the executors is wholly void,* for then the estate descended, as an absolute fee, to the father; upon his death, to the mother of the defendants, and, upon her death, to the defendants. Hence, *quacunqve via data*, the defendants are entitled to the possession of the house and lot devised, as tenants in common in fee.

A judgment, containing this declaration, must be entered, and also that the plaintiff account to the defendants for the rents and profits received by him since the death of their mother; but in taking this account he is to be allowed the payments made by him on account of the annuity to the mother of the testator, for, although the devise is wholly or partially void, the annuity is valid, as a legacy charged upon the rents and profits, (*Hawley v. James*, 16 Wend. 61; *Lang v. Ropke*, 5 Sand. S. C. Rep. 464.)

* The better opinion would seem to be, that the devise to the trustees was wholly void, and such, had it been necessary to decide the question, would probably have been the judgment of the court. Vide *Amory v. Lord*, 5 Seld. 408, (R.)

JOHANN H. SCHROEDER *v.* THE HUDSON RIVER RAILROAD COMPANY; JOHN OTTE *v.* The same; HEINRICH C. DUERKOP *v.* The same.

A contract by a railroad company, for the transportation and delivery of goods, to a point beyond its own limits, is settled to be a valid contract by the Court of Appeals.

When goods were delivered in New York to the company's agent, to be carried to Chicago, and they were not carried there, the defendants were held liable, although the plaintiff had made no demand of them at that place. It appeared that the company had not an office or an agent there of whom demand could be made.

The duty of a common carrier is, to deliver the goods to the owner or his agent personally, and for that purpose to seek him at the place of delivery. He is only relieved from this duty by special contract, or general usage.

The party signing the freight receipt was found not to have any special authority from the company, nor any authority to carry freight to, or deliver it beyond the city of Albany; but it was proven that he was their general agent, to receive all freights offered, and to sign receipts therefor. And by the pleadings it was admitted, that the defendants were common carriers of goods as well beyond as to Albany. *Held*, that the company was sufficiently bound by such agent's receipt.

Held further, that as it did not appear that the goods were transported even to Albany, that the company would have been in all events responsible, for that neglect.

(Before DURE, BOSWORTH and SLOAN, J.J.)
October, 1855.

APPEAL on behalf of the defendants from a judgment entered upon the direction of a Judge for the sum of \$507.72. The action was tried before the Judge without a jury, a jury trial having been waived in open court by the respective parties.

By a written consent the two other causes of Otte and of Duerkop, against the company, were to be tried upon the same evidence, and at the same time.

Judgments have been entered in these cases, and an appeal is taken in each.

The decision of the Judge at Special Term contains a statement of the material facts, and is as follows:—

Schroeder v. Hudson River R. R. Co.

SPECIAL TERM, March 28, 1855. Before BOSWORTH, Justice. —This action having been tried before the undersigned, one of the Justices of said court (a trial by jury having been waived, by the consent of said parties) and having heard the testimony offered by both parties, and their counsel thereupon, I find the facts established by the evidence, exclusive of those admitted by the pleadings, to be as follows—that is to say :

First. On the 14th of November, 1853, at the city of New York, the plaintiff delivered to the defendants, at their depot in said city, six boxes and their contents, to be forwarded to Chicago, Illinois, and to be sent forward from New York on the defendants' railroad. The said boxes and contents, when so delivered, were received on behalf of the defendants by Abraham Pierce, who at that time was a station master, and general agent of the defendants at the depot where the boxes were delivered. He was not the freight master, but was an employee of the defendants under him, and was authorized to receive all freight delivered up to a certain hour of the day, and sign papers evidencing the delivery of freight to, and the receipt of it by, the defendants, to be forwarded on their railroad, and to sign such paper as that secondly hereinafter copied and signed "Pierce."

Second. The said Pierce, on the delivery of said six boxes and their contents to the defendants as aforesaid, executed and delivered to said Schroeder, two several paper writings, in the words and figures following, that is to say :

"Received, New York, November 14th, 1853, in good order, on board the Hudson River Railroad, six cases marked Schroeder, Chicago, Illinois, to be forwarded by us to Chicago.

"6 Cases Goods,

"Marked Schroeder,

"Chicago,

"Illinois. AB'M PIERCE, Agent."

"Received from J. H. Schroeder, six boxes, containing emigrant luggage, marked Schroeder, Nos. 1 to 6, to be forwarded per Hudson River Railroad freight train to Chicago, Illinois.

"New York, Nov. 14th, 1853.

"PIERCE."

Third. Only two of these six boxes and their contents were the property of the plaintiff, and this fact was disclosed to Pierce when the six boxes were delivered to the defendants aforesaid. The two boxes belonging to the plaintiff contained the articles described in the complaint, and the said two boxes, and their contents, at the time they were delivered to and received by the defendants, on the 14th of November, 1853, were worth the sum of three hundred and eighty-five dollars.

Nothing was paid to the defendants, or to any of their agents, for or on account of the forwarding or transshipment of said boxes by the plaintiff. Nor was any thing said by either party as to the amount of freight to be paid for such forwarding or transportation.

Fourth. The plaintiff was an emigrant from Europe, and had then recently arrived in the city of New York. He left the boxes in question with defendant's said agent, on the 14th of November, 1853, he knowing at the time that the plaintiff desired to have the boxes and their contents taken to Chicago, and that he intended starting immediately for the same place. He left New York for Chicago on the same day, and travelled from New York to Albany on the railroad of the defendants. After arriving at Chicago, the plaintiff went several times to the different railroad depots, and to a great many warehouses in Chicago, and looked for these boxes and could not find them. The defendants, on the 14th of November, 1853, had not, and since then have not had, prior to the commencement of this action, any office or agent at Chicago. The said two boxes and their contents were not, nor was any part thereof, carried by the defendants, or by them caused to be carried to Chicago, so that a delivery of them could be there made to the plaintiff.

Fifth. After the plaintiff, upon the search and examination aforesaid, was unable to find the two boxes and contents at Chicago, and before the commencement of this action, he caused the paper writing secondly hereinbefore copied, to be presented to and a demand to be made upon the defendants at their office and place of business in the city of New York, for the delivery to the plaintiffs of said two boxes and their contents. In answer to such demand, the defendants, by their authorized agent, stated that they could not make a delivery of the boxes and contents, but

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they would make a search for them. No further application was made to the defendants for a delivery of said boxes and contents, nor was any other demand for a delivery made than has been stated, before this action was brought.

Sixth. The defendants are a corporation, created by an act of the legislature of the state of New York, passed May 12th, 1846, entitled, "An Act to authorize the construction of a Railroad from New York to Albany," and the acts amendatory of the same, which several acts were read in evidence, are to be deemed a part of this case, and may be read from the published statutes of this state.

Upon evidence given, on his cross-examination, by a witness introduced by the plaintiff, and not objected to, I further find, that the said railroad company receive passengers' luggage to be carried and delivered beyond the terminus of their road, but not luggage or freight of the description of the property in question.

That the said Pierce had no authority to make any special contracts, nor had he any authority to make a contract on behalf of the defendants to carry freight to, and deliver it at points beyond the city of Albany.

But neither the plaintiff nor said Schroeder knew, or had any notice, that it was not according to the common course of the defendants' business, for them to contract to carry and deliver property like that in question beyond the terminus of their road, nor did the plaintiff, or said Schroeder know, or have any notice, that said Pierce was not authorized by the defendants to contract for the carriage of property like that in question, or of any kind of freight from New York city to Chicago, and for its delivery at the place last named.

Before the testimony was unconditionally closed, the plaintiff stated and insisted, that the defendants were, in fact, common carriers beyond Albany, to places to which they might undertake and agree to carry and convey goods and merchandise, and so held themselves out to be; that these facts were admitted by the pleadings, and that the only questions to be tried were, whether they had contracted to carry the property in question to Chicago and deliver it there, and had broken such contract.

The defendants, although denying that the admission by the pleadings was as extensive as the plaintiff claimed, moved for

liberty to amend their answer, so that it should admit they were common carriers between New York and Albany only, and should deny each and every other material allegation in the complaint. The court gave leave to so amend, on condition of the defendants paying the costs of the term, and consenting that the trial be postponed to the next term. The defendants declined to avail themselves of permission to amend on such terms, and the counsel of both parties proceeded to sum up the cause, without any evidence being thereafter introduced by either party.

My conclusions, as to the law, upon the facts found as aforesaid, and upon those admitted by the pleadings, are as follows, that is to say:

First. The defendant is capable of making a contract valid in law, for carrying of goods from the city of New York, and the delivery of them at Chicago. (4 Selden, 37.)

Second. The contract actually made, determining it in the light of both of the papers executed by Pierce, and of the facts of the case, was a contract to carry the property from New York to Chicago, so that a delivery could be made of it there, on the payment of a reasonable or the customary compensation therefor, to be paid on the delivery of the goods. (8 Mees. & Welsby, 421; 3d Sandf. 610, and 1 Smith, 294; 6 Hill, 157; *Cranch v. London and North-Western R. R.*, 25 Eng. L. and Eq. 287.)

Third. The fact proved, that the defendant did not receive property like that in question, to be carried by them to, and delivered at a point beyond Albany, cannot, in this case, be made available to them against an express admission in the pleadings to the contrary. (Code, § 168.)

As they, in fact, did business as common carriers, between New York and Albany, and any points beyond Albany, to which they undertook to carry such property as that in question, and other freight, the only further practical question is, whether the contract made is their contract.

It is proved, by evidence given, that Pierce was not authorized to make such a contract as I have decided this to be. But it being proved that he was their general agent, to receive all freight offered during certain hours of the day, and to sign papers acknowledging the receipt of it, and stating to what place it was to be forwarded, and in such form as that of one of those given in

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this case, and there being no attempt to show that any person had any authority to make contracts which he could not properly make, during the hours when it was his business and duty to receive freight, strangers are not to be prejudiced, who make with him such contracts as the defendants are in the habit of making, merely because they do not know the precise extent of his powers, especially when he holds himself out by his acts as fully authorized to make them, and was authorized to make such contracts as one of the papers signed by him properly imports.

As no objection appears to have been made when the receipt, signed "Pierce," was presented at the office of the defendants, and the goods demanded, that he had no authority to make such a contract as that imported; and as the fact is found, that he was a proper person to sign a paper like that; it seems evident, to me, that the case comes to this narrow point: that the defendant's position is, that Pierce was authorized to make a contract like that, but that, in legal effect, it is a contract to carry to Albany only, and there deliver it to a proper forwarding line, according to the established course of business. If authorized to sign such a paper, he was authorized to make such a contract as that imported, under the circumstances under which it was given. In law, upon the facts found upon the evidence, and upon those admitted by the pleadings, the contract is binding upon the defendants, and is their contract, and the plaintiff is entitled to a judgment for three hundred and eighty-five dollars.

To which decision the defendant's counsel offered the following exceptions:—

1. The defendants except to the decision of the Judge, that the defendants are capable of making a contract valid in law for the conveyance of goods from the city of New York, and the delivery of them at Chicago.

2. The defendants further except to the decision of the Judge, that the contract actually made was a contract to carry the property from New York to Chicago, so that a delivery could be made of it there, on the payment of a reasonable or the customary compensation therefor, to be paid on the delivery of the goods.

3. The defendants further except to the decision of the Judge, that the fact proved that the defendants did not receive property

like that in question, to be carried by them to and delivered at a point beyond Albany, cannot in this case be made available to them, against any express admission in the pleadings to the contrary.

The defendants also except to the decision of the Judge, that the pleadings do expressly admit that the defendants received property to be carried and delivered at a point beyond Albany, and that they did business as common carriers between New York and points beyond Albany.

4. The defendants further except to the decision of the Judge, that strangers are not to be prejudiced who might make with the agent, Pierce, such contracts as the defendants are in the habit of making, because they do not know the extent of such agent's powers.

5. The defendants further except to the decision of the Judge, that the demand, in this case, of the goods in question, was made of the proper person and at the proper place; also, that the agent, Pierce, was authorized to sign such a contract as was proved, or that became binding on the defendants, further than to carry to the city of Albany. The defendants also except to the decision of the Judge, that the plaintiff had the right to recover on the facts proved.

6. The defendants further except to the decision of the Judge, in deciding that the commission, produced on the part of the plaintiff, was admissible in evidence.

Fullerton, for defendants and appellants, argued the exceptions taken to the decision.

May, for the plaintiff.

BY THE COURT, DUER, J.—The question whether a railroad company can make a valid contract for the transportation of freight beyond the limits of its own road, as their limits are fixed by its charter, as we understand the decision of the Court of Appeals, in *West v. The Rensselaer and Saratoga R. R. Co.*, (4 Selden, 37,) must now be regarded as finally settled. It is only upon the supposition that such a contract is valid, that the decision in that case can be explained. It is, therefore, needless to refer to the recent decisions

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in England, or to prior decisions in our own courts, which countenance, if they do not establish, the same doctrine.

But, had the law been otherwise settled, we should still be compelled to say, that, upon the finding of the Judge at Special Term, and the evidence by which it is sustained, the defence set up has wholly failed. The contract made by the agent of the defendants certainly bound them to transport the goods of the plaintiff to Albany, the terminus of their own road; and it is not shown that their contract, even in this limited interpretation, has been performed. For aught that appears, the boxes of the plaintiff never reached Albany at all. The burden of proving that they were carried there, and were there delivered, or tendered for delivery, to the plaintiff, rested upon the defendants, and upon the trial no such proof was given, nor offered to be given.

There is no force in the objection, that it was not proved, on the part of the plaintiff, that the delivery of the goods was demanded by him in Chicago. It is found by the Judge, and his finding is justified by the proof, that the boxes of the plaintiff and their contents were not, nor was any part thereof, carried by the defendants, or by them caused to be carried, to Chicago; and that, prior to the commencement of this action, they had no office there, nor agent at Chicago, from whom the demand could have been made. A demand is excused, when it is shown that it could not have been complied with, and the obligation to make it ceases, when the act is proved to be impossible. *Lex neminem cogit ad impossibilia.*

But, had a different state of facts been proved, still the objection could not have prevailed. It is founded on an erroneous view of the existing law. The duty, which, as a general rule, the law imposes upon a common carrier, is that of delivering the goods, which he undertakes to transport, to the owner or consignee, personally, at the place where the transportation ends. His duty is to seek the person to whom the delivery is to be made, and make its tender; and from this duty he can only be discharged by a special contract, or by proof of an opposite usage. Such was the decision of the Supreme Court, in *Gibson v. Culver*, (17 Wend. 305,) and that such is the established law, is abundantly proved by the cases and authorities which Mr. Justice Cowen, in an elaborate judgment, has there collected and reviewed. (Vide, also, *Magill*

v. *Potter*, 2 Johns. Cases, 371; *Fisk v. Austin*, 1 Denio, 45; *Brice v. Powell*, 3 Comst. 322.)

The objection that has probably been most relied on as creating a bar to the plaintiff's recovery, is, that it has been found by the Judge that the agent of the defendants, Pierce, had no authority to make the contract, upon which this action is founded, but the meaning of the Judge undoubtedly is, that Pierce had no such express authority; that no such authority was in terms delegated to him; and, in our opinion, the effect of this finding is completely removed by his having also found that Pierce was the general agent of the defendants, in making contracts for the reception and transportation of freight; that he was held forth to the world as possessing full authority to make all such contracts, and that the plaintiff had no knowledge or notice of any limitation of his powers. Hence, as the contract upon which the action is founded was certainly within the general scope of the agent's apparent authority, we are clearly of opinion, that it bound the defendants, and that they are answerable for the damages which the plaintiff is proved to have sustained from its breach. (Story on agency, § 443, p. 540.)

It seems to us that the other exceptions stated in the case are so plainly untenable as not to require a special consideration. Even had the answer been amended as was desired, we cannot see that the amendment would have helped the defendants, for, admitting that they were not common carriers from New York to Chicago, we must still have held, that they were liable for their breach of a positive contract.

The judgment at Special Term is affirmed, with costs.

STEPHEN S. CHATTERTON v. EDWARD FOX.

When a tenant is evicted before the expiration of his lease, he is thereby absolved from all liability to pay rent from the commencement of the quarter in which the eviction occurred. He may also recover the difference between the value of his lease for the unexpired term, and the stipulated rent.

If evicted at a season of the year when the expense of removing is greater than it would have been at the expiration of the term, he may recover such extra expense.

But he cannot recover, as a matter of course, any increased rent which he may be compelled to pay for other premises which he may hire for the purposes of the business for which he was using the premises from which he was evicted.

(Before DUEK, BOSWORTH and SLOSSON, J.J.)

October, 1855.

THIS action came before the court on an appeal from a judgment entered upon the report of a referee, in favor of the plaintiff, for \$429.26.

The report is as follows :

I, Henry Brewster, sole referee, appointed to hear and determine the issues in this action, do certify and report to the Superior Court of the city of New York, that I have been attended by the counsel of the respective parties, and that I have examined the issues, and taken the testimony of the several witnesses on oath, and I do find, as matters of fact, that the plaintiff was tenant of the front room in the second story of the building, on the lot at number 136 Water street, in the city of New York, under a lease; his term ending the first day of May, 1853; and that the rent was at the rate of \$250 per annum. That the defendant became the owner of the premises number 136 Water street, in January, 1851, and, as such, the landlord of the plaintiff, and entitled to the rent. That in November, 1852, the defendant, by his servants, so tore down and demolished the building as to deprive the plaintiff of the enjoyment thereof, and in consequence of which the plaintiff was obliged to, and did remove therefrom, the latter part of November, or early in December. That he was subjected to great disturbance and interruption before removing, and that

he was a job printer by trade, and had a business established, which was interrupted for a time, and the good-will injured by his removal, and he was put to expense, inconvenience, and subjected to a heavier rate of rent in the premises to which he removed, besides the necessary losses incident to removal at an unusual and cold season of the year. His damages and expenses I have estimated, after a careful consideration of the evidence, at \$288.⁰⁰/₁₀₀.

I find that the conduct of the defendant is wholly without excuse, and being tortious, I have found the damages resulting on the principle of a liberal allowance of all damage shown to have been sustained by the plaintiff.

The defendant having, in his answer, set up a counter claim, on which issue is joined, by the plaintiff, on the merits, I find that there is due from the plaintiff to the defendant, \$62.50 for one quarter's rent, due on the first of November, 1852.

That the defendant is not entitled to rent after the end of that quarter, because he had destroyed the premises so as to deprive the plaintiff of the enjoyment.

As to the law, I find, that the acts of the defendant bar all claim for rent after the first quarter. That the acts of the defendant being tortious, I may take a more liberal scale of finding damages, where the amount cannot be stated by witnesses with exactness, than in a mere breach of contract; yet that damages must be proved from the acts of the defendant. That the defendant is liable for what was done in this case, it being under his direction.

I also decide that the plaintiff, not having demurred, or moved to strike out the defence of counter claim, and the issue being presented under the rule for reference, I am now bound to try that issue, and allow the counter claim. I have not allowed interest, because the damages of the plaintiff, sustained about the same time, exceeded the amount of the rent due. I do therefore direct judgment for the plaintiff for the sum of two hundred and twenty-six dollars, being the balance of his damages after deducting rent due to the defendant.

The matters of fact, and points of law, upon which the court held that the referee erred, are sufficiently stated in the opinion of the court.

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A. Matthews, for the defendant and appellant.

J. S. Carpentier, for the plaintiff and respondent.

BY THE COURT. BOSWORTH, J.—We think the finding of the referee, that the defendant evicted the plaintiff, and that the eviction was in November, 1852, is fully warranted by the evidence.

The evidence is, that the plaintiff hired the premises in Maiden Lane on the first of November, 1852. This was before the eviction. We are not at liberty to infer that this hiring was in consequence of the eviction. The referee allowed as an item of damage, the "heavier rate of rent" of the premises to which the plaintiff removed. For aught that appears, the plaintiff might have hired a room of the dimensions of that from which he removed, at the same rent, and one as well adapted to his business. If the referee allowed the difference in the rent of the two premises, for the period of six months, he must have allowed eighty-seven dollars and a half for the increased rent, if he allowed the actual difference, for the unexpired term of plaintiff's lease.

Instead of there being any evidence tending to show that the plaintiff was obliged to pay this rent in consequence of the eviction, the evidence shows that he hired before he was evicted, and that if he had not been evicted, he would have been obliged to pay the rent of the premises in Maiden Lane, as well as rent to the plaintiff.

If the plaintiff had a valid lease, which would not expire until the first of May, 1853, the consequences of being forcibly evicted by his landlord in November, 1852, would be, first, an exemption from liability to pay rent from the commencement of the quarter in which the eviction occurred; second, a right to recover the difference between the value of the lease for its unexpired term and the stipulated rent; third, any other damages which necessarily resulted from the eviction.

If it is clearly shown that it cost more to remove, at the season of the year when the eviction occurred, than it would at the expiration of the lease, this excess of expense may be recovered. (*Noyes v. Anderson*, 1 Duer, 342, 352-3.)

The judgment must be reversed, the report of the referee set aside, and a new trial ordered, with costs to abide the event.

HENRY F. WARHUS, Administrator, &c., of FREDERICK WARHUS, deceased, v. THE BOWERY SAVINGS BANK.

F. W., in his lifetime, deposited several sums with the defendants, amounting in the whole to \$198.68, and when he made the first deposit, a book called a pass-book, was delivered to him, in which the sum deposited was entered by an officer of the bank. When the plaintiff, his administrator, demanded payment of the whole deposit and interest, he did not, although required, produce this book, nor allege that it was lost or destroyed, nor was any proof of its loss or destruction given on the trial of this action, in which judgment was demanded for the whole deposit and interest. When the deposits were made, a regulation of the bank was in force, and was put up in a conspicuous place in the banking-room, requiring every depositor, when demanding any payment of his deposit, to produce the original pass-book.

Held, that this regulation was authorized by the charter of the bank, that it was not unreasonable, and that the intestate was chargeable with knowledge of its existence, and consequently, that it was binding upon the intestate and upon the plaintiff.

Held, that as the regulation had not been complied with, the plaintiff, upon the evidence given upon the trial, was not entitled to recover.

Verdict for plaintiff set aside, and new trial ordered: costs to abide event.

(Before DUFF, BOSWORTH and SLOSSON, J. J.)

October term, 1855.

THIS was an action to recover the amount, with interest, of a deposit made by the intestate, F. Warhus, with the defendants. The cause was tried upon the issues made by the pleadings, before Campbell, J., and a jury, in May, 1855.

The following are the material facts established by the evidence upon the trial.

The intestate was credited on the books of the bank with the sum of \$198.68, including interest to the 1st of June, 1855, for several sums deposited by him with the bank.

When the first deposit was made, a book called a pass-book, was delivered to the intestate, in which an entry was made by an officer of the bank of the sum deposited. The book also contained, printed in English, the regulations and by-laws hereinafter referred to, but the attention of the intestate was not directed to them, nor was any explanation given to him of their purport. The intestate, it was proved, was a German, incapable of reading,

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speaking, or understanding the English language, and he continued so ignorant until his death. When he made the deposit, he subscribed his name in a book kept in the bank, containing the regulations and by-laws of the institution. He was directed by a clerk to sign his name in the book, but was not told for what purpose his signature was required.

After the death of the intestate, the plaintiff, in the month of August, 1854, went to the bank, and demanded payment of the whole sum standing to the credit of the intestate, and as proof of his authority to make the demand, exhibited the letters of administration that had been granted to him. He was asked by an officer of the bank whether he had the pass-book, and replied that he had not, and did not know where it was; but did not allege that any search had been made for it by himself or any other person. The letters of administration were then returned to him, and he was told, that without the book, the money would not be paid. A few days thereafter, he commenced this action.

No evidence was given or offered upon the trial to show the loss or destruction of the pass-book.

On the part of the defendants, the following by-laws were proved to have been duly made by the board of managers of the bank, and were read in evidence.

By-law No. 8.—“No person shall have the right to demand any part of his principal or interest without producing the original book, that such payments may be entered therein.”

By-law No. 11.—“On making the first deposit, the depositor shall be required to subscribe, and thereby signify his assent to the regulations and by-laws of the institution.”

These rules had been adopted several years before the intestate made his first deposit, and at that time, were, among others, printed in English and framed, and were hung up in four or five different conspicuous places in the banking-room. It had been the uniform custom of the bank to require their observance.

The counsel for the defendants then called the attention of the Judge upon the trial to the following section in the act incorporating the bank:—

“Section 6.—Such deposits shall be repaid to each depositor when required, at such times, and with such interest, and under such regulations as the board of managers shall from time to time

prescribe, which regulations shall be put up in some public and conspicuous place in the room where the business of the said corporation shall be transacted, and shall not be altered so as to affect any deposit which shall have been made previous to such alteration, until after personal notice thereof." (Sess. Laws, 1804, 414.)

It was then insisted on the part of the defendants, that they were entitled to a verdict in their favor.

The Judge, however, directed the jury to find a verdict for the plaintiff, for the sum of \$204.01, principal and interest, subject to the opinion of the court at General Term, upon the questions of law arising on the evidence.

J. T. Williams, for plaintiff, contended that the plaintiff was clearly entitled to judgment upon the verdict, unless it had been proved that there was a subsisting contract between the intestate and the defendants, founded upon a good and valuable consideration, to the effect that the intestate, and those claiming under him, should not be entitled to demand the funds deposited by him with the bank, unless the original book should be produced at the time of the demand; and he argued, that the rules and regulations of the bank neither created nor contemplated such a contract, but were intended solely for the government and convenience of the officers of the bank, and could not affect the rights of third persons, even if brought home to their personal knowledge. That the signature of the intestate in the book of rules and regulations kept by the bank, was not made by him with the intent that it should be evidence of a contract, or with knowledge that such was the intention of the officers of the bank. There was, consequently, no meeting of the minds of the parties, in reference to the alleged contract, its terms, or subject matter. He cited 19 Johnson, 158; 19 Wend. 284, 251; 2 Hill, 623; 4 Wheat. 225; 5 Mees. & Welab. 585; 1 Paige, 580; 2 Paige, 30; and other cases and authorities.

A. Schell for the defendants, contended that the regulation of the bank, requiring the production of the book, when payment of a deposit was demanded, was fully authorized by law, and was binding on the intestate and his representatives, and as it had not

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been complied with, and there was no evidence to show that the book had been lost or destroyed, the plaintiff could not be entitled to recover, but that the verdict in his favor ought to be set aside, and a verdict and judgment thereon to be entered for the defendants. He referred to a decision alleged to have been made by this court, in the case of *M'Donald v. The Bank of Savings*, in September, 1845.

BY THE COURT. DUER, J.—We are clearly of opinion that upon the evidence given on the trial, the complaint ought to have been dismissed. This is not a case, however, in which a judgment as upon a verdict, which would operate as a bar to a future recovery, ought to be entered for the defendants. It may well be in the power of the plaintiff, in a future action, to give such evidence as will entitle him to recover.

Whether we should be justified in saying upon the case before us, that there was an express contract between the intestate and the defendants by which he bound himself to produce the original pass-book, whenever any payment of his deposit should be demanded, is a question we deem it unnecessary to consider. The plaintiff has no right to maintain this action, if the regulation contained in the bye-laws, requiring the production of the original book, was binding upon the intestate and his representatives; and it certainly was so, if the board of managers had power under the charter to make the regulation, and the regulation was not unreasonable in itself, and the intestate was chargeable in law with knowledge of its existence.

The authority of the managers to make the regulation cannot be doubted. By the express words of the charter, they are authorized to prescribe any regulations they may deem proper, relative to the payment of deposits, and the regulation in the bye-law which they passed is, plainly, of this character. Nor can it be said that the regulation, fairly construed, is unreasonable, and therefore void. In all cases, where there is a written evidence of a debt, and here the original pass-book is such evidence, its production, we apprehend, when payment of the debt is required, or sufficient proof of its loss or abstraction, may be justly demanded by the debtor, and it is this duty, and no more than this, that the bye-law, as we understand it, imposes upon depositors. We have

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no right to say that the meaning of the by-law is, that the non-production of the book, although its loss or destruction may be clearly proved, shall operate as a forfeiture of the deposit, and we are convinced that we should do great injustice to the managers by imputing to them such an intention. Thus construed, the by-law would indeed be illegal and void, but, *ut res magis valeat quam pereat*, we are bound to give it a construction that will render it valid. The only question, then, that remains, is, whether the intestate was chargeable with knowledge of the regulation, and that he was so, seems to us also free from a reasonable doubt. The regulation, as the charter requires, was put up in one or more conspicuous places in the room in which the business of the bank was transacted, and the intention of the legislature plainly was, that this should operate as notice to the depositors. The provision that where a subsisting regulation shall be altered after a deposit shall have been made, it shall not affect the depositor without personal notice, necessarily implies, that when the regulation has not been altered, the depositor shall be bound by it, if it was properly put up in the banking room when his deposit was made; nor is there, in this, the slightest injustice. As a general rule, every person who deals with a moneyed institution, is bound by its regulations, lawfully made, although not communicated to him at all. If he wishes information he must inquire. *A fortiori* is the dealer bound, when an act, which the charter of the institution prescribes, and deems to be equivalent to a direct notice, has been performed. The charter, in the present case, by prescribing the mode by which the means of information shall be furnished to depositors, creates an exception, in their favor, from the general rule.

The conclusion is, that the regulation in question was binding upon the intestate, and upon the plaintiff, as his representative, and it cannot be pretended, that it has been complied with. When the plaintiff demanded payment of the deposit, he did not produce the original pass-book, nor even allege—so far from offering any proof of the fact—that it was lost or destroyed. He said, only, that he did not know where it was, but did not say that he had searched for it in vain, or had searched for it at all. Nor was any proof of the loss or destruction of the book given or offered upon the trial. We do not say that this proof, if offered, could have been received, for this question is not properly before us,

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but, it is certain, that if this evidence could have been admitted, it was a necessary part of the plaintiff's case.

Our decision, therefore, is, that the verdict for the plaintiff must be set aside, and there must be a new trial, with costs to abide the event.

We have been informed by the Chief Justice, that a similar decision was made by this court in 1844 or 5, in a case not differing, in any material circumstance, from the present.

THOMAS CODDINGTON v. WILLIAM W. GILBERT, GEORGE S. COE,
HEYRON D. JOHNSON, and WILLIAM A. NICHOLS.

Bonds executed by a railroad company, and in the hands of its agents, to be negotiated for its use, cannot be seized on an attachment against the company, so as to give the attaching creditor a right to enforce the bonds against the company, or any claims against parties who had guaranteed such bonds, for the better enabling the company to negotiate them.

Property which may be attached under the 227th section of the Code, is property as defined in the 463d and 464th sections. "Personal property includes money, goods, chattels, things in action, and evidences of debt." Such bonds could not be regarded as of either class. The fact that the agents had an interest in the bonds, with a power to sell them for reimbursement of advances, does not make a difference as to the right to attach.

(Before DUKK, BOSWORTH and SLOSSON, J.J.)

October —, 1855.

At the trial of this action, a verdict was taken for the plaintiff for \$3,359.77, subject to the opinion of the court at General Term, on the questions of law arising in the case, the entry of judgment to be suspended, and judgment to be applied for in the first instance at the General Term, with power to the court there to dismiss the complaint, if of opinion that the plaintiff was not entitled to recover.

On the 17th of November, 1853, the Maysville and Lexington Railroad Company, a foreign corporation, created under the laws of Kentucky, were indebted to the defendants, Gilbert, Coe & Johnson, in about \$60,000 upon an unsettled account for moneys advanced. As a collateral security for the payment of this debt,

the defendants held 292 second-mortgage six per cent. bonds of the Maysville and Lexington Railroad Company, of \$1,000 each, (guaranteed in part by the city of Maysville, and in part by the Louisville and Frankfort Railroad Company,) with authority to sell the same, to an amount sufficient to reimburse and protect them for the advances made by them for said company.

About the 26th of January, 1854, the plaintiff, Coddington, having a demand against the Maysville and Lexington Railroad Company for \$3,027.68, commenced an action in the Supreme Court, and issued an attachment under the Code to the sheriff of the city and county of New York.

About the 2d of February, 1854, the sheriff delivered a certified copy of the attachment to the defendants, who, at the same time, gave the sheriff a statement in writing, admitting that they had received notice of the attachment, and stating that all the property in their possession of the Maysville and Lexington Railroad Company, consisted of the bonds above described, and that they held them as collateral security for advances as already mentioned.

The sheriff did nothing further in the matter until after judgment and execution in the action.

May 19th, 1854, the plaintiffs recovered judgment for \$3,174.58, against the Maysville and Lexington Railroad Company, and issued execution thereon to the sheriff.

The sheriff called on the defendants, and informed them he had the execution, with instructions to sell the bonds. The defendants requested the sale adjourned, and said to the sheriff, they would write to the Maysville and Lexington Railroad Company in Kentucky. The sheriff adjourned the sale a week. In the interval the Maysville and Lexington Railroad Company paid the demand of Gilbert, Coe & Johnson, the defendants, and took the bonds.

The sheriff realized nothing on the execution. The plaintiff, therefore, commenced this action, claiming (under the Code, § 287, subd. 3; Laws of 1842, ch. 197, § 4, subd. 3) to recover from Gilbert, Coe & Johnson, double damages for having wilfully withheld from the sheriff property attached.

The action was tried before Justice Bosworth and a jury, on the 19th of March, 1855.

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The court charged the jury that for the purposes of the action, they should consider the bonds in question as property of the Maysville and Lexington Railroad Company, and liable to levy on an attachment.

To this the defendants' counsel excepted.

The verdict was therefore taken as before stated.

S. P. Nash, for the plaintiff.

A. Matthews, for defendants.

BY THE COURT. BOSWORTH, J.—The bonds in question, not having been issued by the Maysville and Lexington Railroad Company, were not property in their hands, or in the hands of their agents, in such sense that any creditor of the company by attaching them could enforce the obligation which their terms import, either by action on the bonds, or by a foreclosure of the mortgage by which they purported to be secured, or by action against the city of Maysville, or the Louisville and Frankfort Railroad Company, on their respective guaranties.

As well might a creditor, on attachment against his debtor, seize a note made by the debtor, and left with an agent to be negotiated, but which had not been negotiated at the time of such seizure.

The attachment requires the sheriff to attach and safely keep all the property of the Maysville and Lexington Railroad Company within his county, &c.

The word "property," as used in the Code, includes property real and personal. (§ 464.)

The words "personal property," as used in the Code, include "money, goods, chattels, things in action, and evidences of debt." (§ 463.)

The bonds were not things in action, on which the company issuing them could maintain an action, nor were they evidence of debt owing to the company. As obligations, they had no validity, and were valueless.

For the purpose of raising the questions of law, to be passed upon at the General Term, they were treated as valid obligations, precisely as they would have been, if they had been issued and

negotiated by some other company, and at the time belonged to the defendants in the attachment. One question, which it was considered would arise for the consideration of the court, was, whether bonds executed by a railroad company, and in the hands of its agents to be negotiated for it, could be seized, on an attachment against the company, and by such seizure give to the creditor any right to enforce the bonds against the company, or to enforce any claims against those who had guaranteed the bonds, for the purpose of enabling the company to negotiate them on better terms. We are clearly of the opinion, that no such rights could be acquired by such an attachment.

The fact, that Gilbert, Coe & Johnson, were authorized to sell enough of the bonds to reimburse them the amount the company owed them, does not strengthen the plaintiff's case. The only property in the bonds, as obligations, which this authority could create, was the property of Gilbert, Coe & Johnson. When they were paid, the bonds, so far as relates to the capacity of the plaintiff to proceed against and attach them, were in precisely the same condition as they would have been if Gilbert, Coe & Johnson had never been creditors of the company, but had at all times held them merely as agents of the company, with power to negotiate them for the company.

The decision of this point being sufficient to dispose of the case, we deem it unnecessary to pass upon any other of the numerous questions discussed at the hearing, and which it was insisted were fatal to the plaintiff's right to recover.

The verdict must be set aside, and the complaint be dismissed.

JAMES ALCOCK v. ANDREW GIBERTON and JOHN BINSSE.

An instrument, under seal, was executed, upon a sale made by the plaintiff to the defendants, by which the former sold to the latter all his interest in the manufacture and sale of porcelain teeth in the city of New York, with his stock on hand, and the good-will of the business. The plaintiff covenanted to instruct one of the defendants in the art of manufacturing porcelain and incorruptible teeth, and to furnish him with his recipes therefor. The agreement also contained the following clause: "And the party of the first part will not carry on, or cause to be carried on by any person with whom he shall be interested, the manufacture of porcelain teeth, or impart the knowledge of manufacturing the same to any person, other than as aforesaid."

It was alleged, in the complaint, that the said art of manufacturing porcelain teeth, in which the defendant was to be instructed, was a secret of the plaintiff, and known to be such by the defendant.

Held, on demurrer, that the covenant in question was valid, and not one in restraint of trade.

Quere, as to the effect of one covenant, void, as against public policy, being united in the same instrument with a valid covenant?

Ruling of the judge at, Special Term, that, ordinarily, it will not vitiate the whole contract, not passed upon by the court at General Term.

(Before DUNE, BOSWORTH and SLOSSON, J.J.)

October term, 1855.

THE case arose upon an appeal from an order of Justice Hoffman at Special Term, overruling a demurrer to a complaint, and giving judgment against the defendants, unless they should answer and pay costs within twenty days.

The statements of the complaint, and the points raised, are fully set forth in the opinion of the Judge at Special Term, which is as follows:—

The questions arise upon an agreement, dated the twenty-ninth day of December, 1853, made between the present plaintiff and defendants. By that agreement, the plaintiff engaged to sell to the defendants "all his right, title and interest, in the manufacture and sale of porcelain or mineral teeth hitherto held by him in the city of New York, with all his porcelain teeth contained in the dépôts, with the moulds, machinery, and materials used in con-

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nection with such manufactory, and also the good-will of the business," upon the terms therein specified. The good-will was estimated at the sum of \$8,000.

The mill and materials, including biscuit teeth, were to be inventoried at their actual cost; the other tools and fixtures, at fifty per cent. below their cost: all the stock and merchantable teeth, at fifty per cent. below their then retail prices, viz., pivot and plate teeth ten cents each, and gum teeth twenty cents each.

The periods and amounts of the payments are then specified. And it was covenanted, that the sale of the good-will of the business, tools, fixtures, and materials, should not be perfected, nor a bill of sale therefor executed, until the payment of \$10,000; and of the first-mentioned instalment, agreed to be paid on or before the thirty-first of July, 1854, various particulars, as to the mode of payment, are there stated.

The instrument contains the two following clauses—"and it is further agreed by the parties hereto, that the party of the first part shall, from the 2d day of January next to the 31st of July, 1854, give directions and instructions to Adrian Giberton, one of the parties of the second part, in the art of manufacturing porcelain, or incorruptible teeth, and also his receipts for the fabrication of the same, and that the party of the first part, will allow and permit the said John Binsse, the other party of the second part, to be present at the tuition of the said Adrian Giberton in the art of manufacturing the teeth as aforesaid, and that the said party of the first part will not carry on, or cause to be carried on by any person with whom he shall be interested, the manufacture of porcelain teeth, or impart the knowledge of manufacturing the same to any person other than as aforesaid."

The amended complaint contains the following passage, which was not in the original complaint—"and the said plaintiff avers, that the mode of manufacturing the said porcelain teeth, mentioned in the agreement aforesaid, in the art of manufacturing which the said plaintiff agreed to instruct the said defendant, Giberton, and the manufacture of which, in and by said agreement, the said plaintiff agreed not to carry on, or cause to be carried on by any person with whom he should be interested, and the knowledge of manufacturing which teeth, said plaintiff, in and by the same agreement, stipulated not to impart to any person other than the

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said defendant, was a secret with the said plaintiff, and the said defendant knew it was when said agreement was made."

The want of an allegation of this nature is understood to have been the ground of the allowance of the demurrer to the original complaint. It was supposed that it did not sufficiently appear on the face of the instrument that a secret was disposed of.

With the present allegation, the case appears to be a very plain one.

The cases of *Bryson v. Whitehead*, (1 Sim. & Stewart, 74,) and *Peck v. Jarvis*, (10, p. 118,) seem decisive. Here is the sale of a business secret, and an engagement by the vendor not to use that secret in conducting any business himself. The validity of this covenant is to my mind clear. See, upon the subject of such covenants generally, *Ramine v. Irving*, (7 Marn. & Graing, 976,) and *Mullan v. May*, (11 Meeson & Welsby, 633.)

The case presents another question which was adverted to by the Chancellor in *Jarvis v. Peck*. I had decided that case as Assistant Vice-Chancellor, (see Hoffman's Reports, 497,) and placed the decision on the ground that there was a large consideration for the bond, entirely independent of the covenant supposed to be in restriction of trade. The Chancellor, upon the appeal, notices some cases in support of this view, but deemed it unnecessary to pass upon it. (See 10 Paige, 119.)

In the present case, the consideration was a sale of the good-will, which the parties estimate at \$8,000, and of the stock of materials and tools, as well as of teeth already made, of a large, though unascertained value. The question is, whether, if the particular covenant is void, the contract may not still be sustained upon these considerations.

In addition to the numerous authorities cited in the opinion in Hoffman's Reports, and those referred to by the Chancellor, the following may be noticed:—*Cheseman v. Naseby*, in the House of Lords, (1 Br. P. C. 234,) settled that a bond given by a hired servant or apprentice, not to exercise the trade of a linen draper after the expiration of her time of service, at any place within half a mile from the dwelling house of the party, or any other house, she should remove to, was valid.

Price v. Green, (16 Meeson & Welsby, 347,) applied the same principle to a covenant, and determined that where the covenant

was not to practice the trade of a perfumer in London or Westminster, or within six hundred miles from the same respectively, the covenant was void as to the latter clause, but good as to the cities. In this case, the distinction is noticed between void and illegal covenants. The stipulation as to the six hundred miles was of the former class. The fact was also adverted to, that the whole covenant, doubtless, formed the consideration for the payment of the £1,500, the amount given; but it was answered, that the rest of the restriction formed a sufficient consideration for the agreement.

This decision followed and supported that of *Mullan v. May*, (11 Meeson & Welsby, 643.) In this case, the doctrine upon these covenants in restraint of trade, is stated and explained by Baron Parke, as carefully as in any case of which I am aware. The chief test is, whether the contract will be prejudicial or not to the public interest. It was held in the case, that a covenant that the party should not carry on the business of a surgeon-dentist in London was valid, but the further restriction, "or in any of the towns or places in England or Scotland, where the plaintiffs, or the defendant, on their account, might have been practicing before the expiration of his service," (as an assistant,) was void.

It cannot be questioned that in many cases much difficulty must attend the application of this doctrine. In the present case, for example, probably the principal consideration of the contract was the agreement to abstain from carrying on the business, or instructing others in it. If this is void, and cannot be enforced, it would be hard to sustain the contract on the ground of the other portions of the consideration.

This view was considered by Baron Parke in *Price v. Green*, before stated, and the rule of that, and the many other cases seems to be, that if a sufficient valuable consideration remained, after rejecting the illegal one, to support the contract, the court would enforce it.

On both grounds, I am of opinion that the demurrer must be overruled, and judgment be rendered for the plaintiff upon the same, with liberty to answer in twenty days.

Jordan, for the appellants and defendants.

Archer, for the respondent and plaintiff.

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BY THE COURT.—We concur in the decision of the Judge at Special Term overruling the demurrer, and giving judgment for the plaintiff. We consider that he is clearly right in the first point stated in his opinion, viz., That the covenant not to use the secret mode of conducting the business, or manufacturing the teeth, was valid in itself. We do not find it necessary to consider the other important question raised by the learned Judge, as to the effect of a union in the same instrument, of a covenant prohibited by law, or against public policy, with another of a perfectly valid character, and express, therefore, no opinion upon it.

Order affirmed with costs.

GEORGE F. THOMAS, Assignee of ISAAC H. BASSETT and ROBERT W. ABORN, *v.* EDWARD A. QUINTARD.

Upon the sale of an interest in a patent, the purchaser is precluded from setting up the want of value in the invention, or insufficiency of the materials, where he has sold the right transferred to him, to another for value. He cannot defend an action for the unpaid purchase money on that ground. It would be otherwise if there had been a warranty, or express representation of the value or character of the article.

By parting with the patent, he had disabled himself from reinstating the plaintiff in its possession, and this forms another answer to his defence.

(Before HOFFMAN and SLOSSON, J.J.)

November 7-27, 1855.

THE cause came up on a verdict taken, subject to the opinion of the court, upon a case to be made, with a stay of proceedings, and to be heard in the first instance at the General Term. The defendant moves that the verdict be set aside, and a new trial granted, with costs to abide the event.

The plaintiff is the general assignee of Bassett and Aborn, and the action was brought upon a promissory note given by the defendant to the firm of Bassett, Aborn & Motley, upon his purchase from them of an interest in a certain patent known as Mason's Patent Sperm Oil. Motley released all his right and interest in the partnership assets to his copartners, Bassett and Aborn, and the note passed, with other assets of the firm, into the hands of

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the present plaintiff, as their assignee, under a general assignment for the benefit of creditors. The following is a copy of the note:

\$1,070.

NEW YORK, *July 1st*, 1853.

Twelve months after date, I promise to pay to Messrs. Bassett, Aborn & Motley, ten hundred and seventy dollars, for value received.

E. A. QUINTARD.

Endorsed, BASSETT, ABORN & MOTLEY.

BASSETT & ABORN.

The defence was, that the note was not negotiable, nor intended to be so; that it was without consideration passing to the defendant from any one.

The defendant proved that the note was given, among other notes, in payment of a purchase of an interest in a patent known as Mason's Patent Sperm Oil.

The defendant's counsel, at the trial, offered to show of what ingredients the article was composed, the offer was rejected, and an exception taken.

He next offered to show, that the article which was sold by Bassett, Aborn & Motley, and called Mason's Sperm Oil, was composed of ingredients substantially different from that patented, and that the latter was of no value, and incapable of use.

This was also rejected, and forms the ground of another exception.

A distinct offer was also made, to prove, that the thing patented was of no value, and again, that the thing patented would not produce the effect described in the patent.

Both these offers were overruled. It appears that the defendant had assigned his interest in the patent and invention to one Jones, before the suit was commenced, and this assignment recited the assignment to himself of the patent right, known as Mason's patent, and purports to transfer it, as it was transferred to the defendant.

There was no warranty upon the sale, and there were no representations as to the character or value of the articles sold.

De Forest, for the plaintiff.

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Worth, for the defendants.

BY THE COURT. HOFFMAN, J.—We think the plaintiff is entitled to judgment upon the verdict, on two grounds.

First. That his own assignment precludes him from saying that what he sold was valueless; and there being neither warranty nor fraudulent representation, there was a sufficient consideration for the note. (*Johnson v. Titus*, 2 Hill, 606; *Oakley v. Boorman*, 20 Wend. 596; *Say v. Richards*, 21 Wend. 626; *Williams v. Hicks*, 2 Vt. 36.)

Next. That, by parting with the patent to another, and apparently on a valuable consideration, he has disabled himself from placing the plaintiff in the same situation as he was in at the formation of the contract. The defendant would have a right to call for the restoration of what was transferred. It may be of some value to him. (*Taylor v. Hare*, 4 Bos. and Pull, 201; *Barnet v. Stanton*, 2 Ala. Rep. 181; *Chance v. Commissioners of Clay County*, 5 Blackford, 441; *Conner v. Henderson*, 15 Mass. Rep. 319; *Griffith v. The Fred. County Bank*, 6 Gill & John. 624.)

Besides these considerations, the defendant is probably estopped by his own assignment, referring to that to him, from questioning the patent or invention. The case of *Boorman v. Taylor* (2 Add. & Ellis, 278) is very strong to this point. Upon these views, the ruling of the Judge was, in all respects, correct.

Judgment for the plaintiff, for the amount of the verdict, with interest and costs.

LUKE B. PACKARD v. JOSEPH LYON and WILLIAM H. MCLEAN.

A note was lodged at a bank for collection, and demand for payment was made there, with inquiry of the officers as to the residence of the maker. The directories were at once consulted, and her name not found. No inquiry was made of the actual holder of the note; and it appeared, that the maker, being a married woman, kept a boarding-house in the city.

Held, that due diligence had not been used in presenting the note for payment. Complaint, as to endorsers, dismissed, with costs.

(Before HOFFMAN and SLOSSON, J.J.)

November term, 1855.

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A VERDICT in this cause was taken at the trial for the plaintiff, subject to the opinion of the court at General Term, on the single question, whether the presentment for payment of a note, on which the action was brought, was sufficient to charge the endorsers.

The facts sufficiently appear, in the opinion of Mr. Justice Slosson.

Niles, for the plaintiff.

Hays, for the defendants.

BY THE COURT. SLOSSON, J.—This is an action against Emeline Deacon, as maker, and Lyon & McLane, as endorsers, of a note for \$225, dated 28th Sept., 1854, payable, to the order of the maker, sixty days after the date thereof.

Mrs. Deacon does not defend. The endorsers, Lyon & McLean, alone defend; and the only question is, whether a sufficient presentment of the note and demand of payment had been made of the maker.

Subjoined to Lyon's endorsement, were the words "White Plains, Westchester Co."

The note was deposited for collection, in the Island City Bank of this city.

The certificate of the notary of the bank showed that the note was presented on the 28th of March, 1854, (the day it fell due,) at the Island City Bank, and payment demanded: and a clerk of the notary proved that he demanded payment of the teller of the bank, and it was refused; that he asked the teller where Mrs. Deacon, the maker, resided, who told him he did not know, but thought she resided in Westchester county; that he asked all the bank officers who were present, and none of them could tell him any thing about her. He did not ask any of the officers of the bank, nor did he inquire of any one else, who was the owner of the note. He did not ask either of the endorsers where Mrs. Deacon resided, nor did he make this inquiry of any one except the bank officers. He examined the city directories, and did not find the name of the maker in them.

Two of the city directories were put in evidence, and in neither was to be found the name of Mrs. Deacon, or of her husband, Edward Deacon.

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It appeared, in evidence, that Mrs. Deacon resided in Astoria, until about three weeks before the first of May, 1854; that she then removed to this city, and, on the 1st of May, moved to No. 70 Union Place, which premises she hired of Mrs. Lucius Comstock, and which she occupied, as a boarding-house, until the 8th Nov. following, when she removed to No. 251 Fourth avenue, where she remained for six weeks, keeping a boarding-house also at the latter place. She was consequently residing at this latter place when the note fell due.

The note was given for rent of the premises No. 70 Union Place, and was made by Mrs. Deacon, at the house No. 70 Union Place, and was handed to Mr. Comstock, the husband of the landlady, by McLean, one of the endorsers, who is the son-in-law of Mrs. Deacon, in Mrs. Deacon's room at No. 70 Union Place. Comstock sold the note to the plaintiff.

A motion was made at the trial to dismiss the complaint, on the ground that the plaintiff had not proved due presentment and demand of payment of the note of the maker, or that the maker could not have been found upon due and diligent inquiry.

The motion was overruled, and a verdict was taken for the plaintiff, subject to the opinion of the court on the single question as to the sufficiency of the presentment and demand.

No question arises as to the sufficiency of the notice to the endorsers. If the demand was sufficient the defence fails.

The note is not payable at any particular place, and the general rule which the courts have always adhered to is, that in such a case, if the maker has a known residence in the state, a demand, in order to fix the endorser, must be made of him at such residence. (14 J. R. 114.) If he has no known residence or place of business at which the note can be presented, presentment is excused. So if after the making of the note the maker absconds, or removes from the state to reside elsewhere, a presentment need not be made.

If the residence be known to the holder, and has not been changed since the making of the note, a demand must be made, though the residence be in another state. (*Taylor v. Snyder*, 3 Denio, 145; *Spies v. Gilman*, 1 Comst. 321.)

In the case at bar, the maker actually resided in the city of New York, both at the time the note was made and when it fell

due, though in a different street at the latter period. She was, at both periods, keeping a boarding-house. The holder was bound to use all reasonable and proper diligence to find the maker and demand payment. "Whoever," says Judge Thompson, in *Anderson v. Drake*, 14 J. R. 114, "takes a note (not payable at any particular place) is presumed to have made inquiry for the residence of the maker, in order to know where to demand payment, and to assume upon himself all the inconvenience of making such demand."

Was that diligence used in the present instance?

The notary received the note at three o'clock; he goes to the bank and asks the officers in attendance where the maker lived, and, as might have been anticipated, they could give him no information; he makes no inquiry of any person, not even of the officers of the bank, who the owner of the note was, nor did he ask either of the endorsers where the maker lived, though one of them (McLane) had an office in the city, and was served, the next day, with notice of protest, at his office. Finding that he could get no information at the bank, and that the maker's name did not appear in the city directories, the notary formally demands payment at the counter of the bank, and forthwith gives notice to the endorsers. It is impossible to say that this was due diligence.

It may be exceedingly inconvenient at times to find the place of residence of the maker of a note, but that forms no excuse for the want of the knowledge if it can be obtained.

It was gross carelessness in the holder (the plaintiff) to send the note to the bank for collection, without a memorandum endorsed on it, or accompanying it, to show where the maker was to be found. This was a duty which he owed both to the bank and its notary, and he is without excuse in throwing upon the latter officer the trouble, annoyance, and possible risk of finding out a fact for his benefit, with which he is presumed to be himself acquainted, and with which he ought to be acquainted in fact.

The complaint must be dismissed, as to the endorsers.

HOFFMAN, J.—We do not consider the second point of the plaintiff's, nor the case cited, applicable to the present question. *Miller v. Gaston* (2 Hill, 188) refers to the rule as stated in *Hough*

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v. *Gray*, (19 Wendell, 202,) and the rule so declared is, that if a party, at the time of making the note, endorses upon it an absolute guaranty to pay it, he may be treated as a joint and several maker and promiser. Demand and notice would then be unnecessary. In *Dean v. Hall*, (17 Wendell, 214,) the point is more elaborately examined.

But in this case, McLean stands in the character of an endorser, probably an accommodation endorser merely.

The third and fourth points of the plaintiff are, that when the maker is without a fixed place of residence, or absconds after the note is given, no demand is necessary; and again, that if he cannot be found, want of demand will be excused. But in the present instance the maker was, at the maturity of the note, keeping a boarding-house at 251 Fourth avenue.

On the complaint in this case, the plaintiff must be considered as the owner of the note at its maturity. The bank had, it may be assumed, received it for collection. There is nothing to show they had discounted it.

In *Taylor v. Snyder*, (3 Denio, 145,) Justice Beardsley stated the rules, and went through the cases, with great care. He examined the exceptions to the rule requiring a personal demand of the maker, or at his dwelling house, or place of abode, or at his counting house or place of business. "It is," he remarks, "a question of diligence; and if a demand is found to be impracticable, proper efforts for that purpose having been made, the endorser will be held liable, due notice having been given to him."

He states one of the exceptional cases thus: "In every case where the maker has no known residence, or place at which the note can be presented for payment, a demand will be excused."

He cites Story on Pr. notes, 237; *Whittier v. Graffam*, 3 Greenleaf, 82; *Putnam v. Sullivan*, 3 Mass. 53; *Duncan v. McCullough*, 4 S. & R. 480.

Not one of these authorities approaches to the support of the proposition, that where the maker's residence is in a particular place, known to the endorsers, probably and presumptively known to the owner, an inquiry and demand of the bankers with whom the note is lodged for collection, and search in a directory is enough.

It is attempted to bring the case within that class of authorities

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which hold that an endorser is not discharged, when it clearly appears that he could suffer no injury from the want of presentment.

To this proposition, the language of Mr. Justice Nelson, in *The Mechanics' Bank v. Griswold*, (7 Wendell, 168,) and of Justice Cowen, in *The Commercial Bank v. Hughes*, (17 Wendell, 98,) may be cited. The rule is best stated in the example given by Judge Nelson. "Where the endorser is himself the debtor, as where the note is discounted for his accommodation, and the money raised upon it is received by him, and, therefore, he is ultimately holden to pay it, the reason of the rule cannot apply."

The only ground of excuse here, is, that the endorser got notice of a presentment and dishonor, and that the maker was insolvent. In other words, he could not, and would not, have paid, had he been personally required to do so.

This is not a legal excuse for omitting a regular presentment.

Judgment must be entered for the defendants, Lyon & McLean, dismissing the complaint with costs.

ALRICK ZELLWEGER and OTTO F. KRAUS v. PHILIBERT CAFFÉ, SMITH CUTTER, Jr., and DANIEL T. YOUNGS. The same v. The same and ESTHER ANN CATLETT, Executrix of HENRY LAVERTY, deceased.

Where promissory notes, endorsed for the accommodation of the maker, are used as collateral security for a credit granted to the maker, although the endorsers may justly be considered as sureties, still the legal character of their contract, as that of endorsers, is not changed, and no objection can, therefore, be taken to it under the statute of frauds.

Where, by the agreement between the makers of the notes, and the persons by whom the credit was granted, the credit is to be made available by bills drawn by the former, and accepted by the latter, the fact that subsequent bills on account of the credit, were drawn by an agent of the makers, and the proceeds applied by him to their benefit, and according to their instructions, is not such a departure from the terms of the agreement, as can operate to discharge the endorsers, as sureties.

If, by the terms of the agreement, the persons granting the credit are to be placed in funds to meet their acceptances, by approved bills, to be remitted to them within a certain time before their acceptances fall due, the failure to make the stipulated remittances in due season, is a breach of the agreement, which gives to the

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person granting the credit an immediate right of action upon the promissory notes held by them as collateral security for the performance of the agreement. In such an action, they are entitled to recover the whole amount of their acceptances, that were not covered by remittances, when the action was brought. Upon these grounds, judgment rendered for the plaintiffs, for the whole amount of the endorsed notes upon which these actions were founded.

(Before DUMAS, BOSWORTH and SLOAN, J.J.)

Heard, October term; decided, December term, 1855.

CASE, upon a verdict taken, subject to the opinion of the court at General Term, with liberty to turn the same into a bill of exceptions. The plaintiffs now move for judgment.

The actions were upon four several promissory notes, against the makers and endorsers. In one, the executrix of Henry Lavery is a party; in the other, she is not. A severance was made, as to the executrix, and the actions tried together, as against the other defendants, by consent.

In the first action, the complaint set out two notes, drawn by Caffé & Cutter, a mercantile firm, in favor of Youngs: one, for \$2,000, dated 30th of April, 1853, at six months; the other, by the same makers, also in favor of Youngs, for \$3,000, dated July 8th, 1853, at four months. It alleged an endorsement, by Youngs, of each note, and delivery to the plaintiffs, for valuable consideration. Presentment and protest were also duly stated.

The defence was, in both actions, that the notes were made and endorsed by Youngs and Lavery, without consideration, and as accommodation paper, to enable Caffé & Cutter to deposit the same with Felix Collomb, agent of the plaintiffs, as collateral security for certain drafts, authorized by him to be drawn by Caffé & Cutter, or by Cutter alone, and agreed to be accepted by the plaintiffs, a firm established at Paris. Such drafts were to be made from time to time, as the defendants required, and to the extent of about seventy thousand francs. It was then averred, in the answers, that the defendants Caffé & Cutter never made such drafts, nor did the plaintiff's firm ever make such acceptances, which are outstanding against said Caffé & Cutter.

The defendants, in their answer, also state, that Caffé & Cutter, instead of using the credit as agreed upon, transferred the same, through Cutter, to a certain firm of S. Allain & Co., in Paris, to be drawn for and used by such firm for its own use and benefit, which was accordingly done.

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On these grounds, it was insisted that the contract of Youngs and Lavery, became null and void, and they were discharged from all liability. The following is a history of the transactions between the plaintiffs and Caffé & Cutter, according to the evidence given upon the trial:—

The plaintiffs are bankers, in Paris, under the firm of U. Zellweger & Co. Felix Collomb was their agent in New York, and authorized to grant credits upon them. Caffé & Cutter were importers of millinery goods, in New York. In 1849, Collomb commenced granting to Caffé & Cutter credits on U. Zellweger & Co. The credit was originally for fra. 25,000, and the nature of the transaction was expressed in a letter of 4th June, 1849, addressed to Caffé & Cutter; no subsequent letters passed between Mr. Collomb and Caffé & Cutter, but such variations as were made in the manner of transacting their business were arranged verbally, either between Mr. Collomb and Caffé & Cutter, in New York, or between U. Zellweger & Co. and Mr. Cutter, one of the members of that firm, in Paris. Collomb never saw either Mr. Youngs or Mr. Lavery in reference to the transactions.

The original credit, for 25,000 francs, was secured by Caffé & Cutter's notes: one, for \$3,000, endorsed by Mr. Youngs alone; and the other, for \$2,000, endorsed by Mr. Youngs and Mr. Lavery.

This credit for 25,000 francs was first increased, June 20th, 1851, by 10,000 francs additional; the increase being only temporary, at first, on account of the scarcity of bills, but afterwards made permanent, by a verbal arrangement.

Upon this increase, of 10,000 francs, a note of Caffé & Cutter, endorsed by Mr. Youngs alone, was taken as collateral security. On the 12th October, 1852, these credits were increased by an additional amount of 40,000 francs, making a total of 75,000 francs, at which amount they continued permanent after that time. Upon this last increase, of 40,000 francs, Caffé & Cutter's note for \$8,000, endorsed by both Youngs and Lavery, was deposited as collateral. The arrangement was made verbally between Caffé & Cutter and Mr. Collomb. No formal letter of credit was issued. The communications in reference to it passed between Mr. Collomb and U. Zellweger & Co., in their general correspondence, and the arrangement was finally ratified and completed between U. Zellweger & Co. and Mr. Cutter, personally, in Paris.

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After these several increases of the credits, thus reaching their maximum, 12th October, 1852, no discrimination was made, by specific notes being deposited to secure specific credits, or by specific drafts being drawn against specific credits, but all the notes were deposited as security for all the credits, indiscriminately, and the drafts were drawn against the credits indiscriminately.

By the course of business between Mr. Collomb and Caffé & Cutter, Mr. Collomb returned their notes, endorsed by Mr. Youngs and Mr. Lavery, to them, always a few days before they became due, and received from them similar notes in renewal.

Mr. Cutter, being in Paris, employed S. Allain & Co., a commission house there, to make his purchases of goods for his firm, and instructed U. Zellweger & Co. to accept the drafts of S. Allain & Co., drawn under the credits accordingly, in payment of goods so purchased for his house, which they did, to the full amount of the 75,000 francs; and as fast as the acceptances were paid and covered by remittances, U. Zellweger & Co. again accepted drafts, drawn under the credits, in the same manner. U. Zellweger & Co. accordingly accepted the drafts of S. Allain & Co., drawn, in pursuance of these credits, for the full amount of the 75,000 francs, before the maturity of the notes in suit; and all these drafts were paid, by U. Zellweger & Co., at their maturity. These acceptances were regularly advised, by U. Zellweger & Co., to Caffé & Cutter. Caffé & Cutter have never made any remittances or payments to U. Zellweger & Co., on account of their acceptances and payments, for their account.

All other material facts and portions of the evidence, necessary to a full understanding of the points decided, are stated in the opinion of the court.

Larocque, for the plaintiffs.

Bryan and Thompson, for defendant Youngs.

W. Bliss, for the executrix of Lavery.

BY THE COURT. SLOSSON, J.—I shall consider the case principally in its connection with the endorsers, and the conclusions to which we have come will be equally applicable to all the defendants.

The form of the contract upon which Youngs and Laverty are sought to be charged, is that of the endorsement of promissory notes, and the notes being negotiable, it is only as endorsers that they can be made liable. The character of their engagement cannot be changed into that of a special guaranty, and had the plaintiffs failed in their proof of presentment and notice, these defendants would have been entitled to a verdict on that ground alone. (*Scarbury v. Hungerford*, 2 Hill, 80; *Hall v. Newcomb*, 3 Hill, 233; *Purser v. Luqueer*, 4 Hill, 420.)

It makes no difference, in this respect, that the endorsements were for the accommodation of the makers, nor that they were intended as a security for the performance, by the latter, of certain conditions in favor of the plaintiffs. The legal character of the contract remains the same, and no objection can be taken to it under the statute of frauds. (*Parks v. Brinkerhoff*, 2 Hill, 668.)

If the endorsements are to be treated as having been made for the general accommodation of Caffé & Cutter, without restriction, they could be available in the hands of any party who should receive the notes from Caffé & Cutter, for value, and on this theory of the case, the plaintiffs became holders, for value, when they gave the credits and accepted the drafts in question, and would be entitled to recover as such holders for value, irrespective of any rights they might have against the parties, under the arrangement with Caffé & Cutter. This theory would by no means be an unreasonable one. There is no evidence to connect the endorsers as parties to the arrangement between Collomb, the plaintiff's agent, and Caffé & Cutter, and it is only as matter of inference from the testimony, that this court can hold that they even knew to what purpose the notes were to be applied, and it would not be straining the case to treat it as the ordinary one of general accommodation paper, without restriction as to its use, in the hands of a *bonâ fide* holder for value.

It would, however, be more consistent, I think, with the real character of the transaction, to consider the endorsements on the defendant's own theory, as accommodation endorsements for a special purpose, and the defendants as cognizant of the general purpose to which the paper was to be applied, and I think their knowledge is to this extent fairly to be inferred from the evidence. This does not alter their legal position, so far as the form

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of the contract is concerned; their liability would still be that of endorsers merely, but whether this liability could be enforced against them, would not depend upon the mere fact of a default on the part of the makers in paying the notes at maturity. The question would involve an inquiry into the nature and character of the entire transaction. If the notes were deposited for a special purpose, under an arrangement, the particulars of which had been left by the endorsers to Collomb, Caffé & Cutter to adjust, between themselves, then their liability would depend upon the fulfilment of the stipulations which might have been agreed upon between those parties.

It becomes necessary, therefore, to inquire into the circumstances under which, and the conditions, if any, upon which the notes came into the plaintiffs' hands.

That the notes were deposited by Caffé & Cutter with Collomb for a special purpose (the security of the credits) is undeniable, and I shall assume it as equally undeniable, because the evidence warrants it, that the endorsers knew the general purpose for which they were deposited, and made their endorsements in order to enable Caffé & Cutter to effectuate that purpose. There is not a particle of evidence, however, to show that either of them ever prescribed the mode in which the credits were to be availed of by Caffé & Cutter, or that they imposed any restrictions upon the use of the credits, or of their endorsements as a security therefor, or that they were ever informed of the particulars of the arrangement with Collomb after it had been made, in June, 1849, or at any subsequent period. Their object appears to have been, to give to Caffé & Cutter, in the particular transaction, the benefit of their endorsements as a security for the credits in question, in the way of a general accommodation, leaving the entire arrangement of the particulars to those gentlemen and the plaintiffs with whom they dealt.

If such was the object of the endorsements, it would practically be a matter of indifference to the endorsers, how the bills were in fact drawn, or how they were agreed to be drawn, since the general object of accommodation would be equally secured to Caffé & Cutter, whether the drafts were drawn in their own names, or in the name of Smith Cutter, jr., or in that of Allain & Co.; the mode of drawing would be a matter in which they could have no

interest, so long as the notes, to which they were parties, were applied to the purpose for which they had endorsed them.

But the defendants contend that the object of the endorsement was not of the general character above supposed, but that they were made not only for a special purpose, which is conceded, but on conditions and limitations to which they, the endorsers, were, in legal contemplation at least, parties, and that by the failure of these conditions their liability has ceased. They claim for themselves the position of strict guarantors, or sureties for Caffé & Cutter in the transaction in question, and their theory is, that under the arrangement between Caffé & Cutter and Collomb their engagement was limited to such drafts as should be drawn by Caffé & Cutter themselves, or by Smith Cutter, jr., and that the transfer of the credits to Allain & Co., and the drawing of the bills in the name of the latter firm, was an entire departure from, and breach of the conditions of this their engagement.

This raises the question whether, by the terms of this arrangement, any such restriction existed on the use of the credit as should have prevented the drafts from being drawn in the way in which they actually were drawn, that is, in the name of Allain & Co.

The terms of the arrangement are all embodied in Collomb's letter of the 4th of June, 1849, (the date of the original credit,) taken in connection with the letter of credit itself of that date.

By these it appears that the credit was opened in favor of Smith Cutter, jr., one of the firm of Caffé & Cutter, then in Paris, on the business of the house, and that it was to be availed of by his bills on the plaintiffs at 90 days' date or sight.

Evidence of usage was offered by the plaintiffs, and rejected in the first case (that of Mrs. Catlett) and received in the other, to show that where a credit is granted to a house in New York, on a foreign house, it is customary for the parties receiving the credit to avail themselves of it by either drawing against it themselves, or by transferring it to other parties, in part or in whole. Whether this evidence was properly admitted or not, may be doubtful, but it is unnecessary to consider the question, as the proof falls short of what is necessary to establish such a custom, and the case does not require a resort to evidence of this nature. The whole case shows that the credit was really in favor of the firm of Caffé & Cutter, of which Smith Cutter, jr., was a member.

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Drafts by Caffé & Cutter would have been equally within the scope and meaning of the arrangement, as drafts by Smith Cutter, jr., himself, and we find the plaintiffs putting the same interpretation on the agreement, for in the second letter of credit, the credit is expressly made in favor of Caffé & Cutter. By the terms of the letter they are to dispose of the credit according to custom, (their own of course,) at 90 days' sight or date. Moreover, the transfer of credits to Allain & Co. was made in the name of Caffé & Cutter, and all that company's drafts are charged to the latter's account.

The agreement must be reasonably interpreted. If it was allowable within the meaning of the arrangement, for drafts to be drawn in the name of Caffé & Cutter, then they might properly be drawn in the name, and through the medium of an agent of that firm, which relation Allain & Co. clearly sustained. It was an agreement of convenience, and evidently so intended. I admit that had a special guaranty been subjoined to the letter of credit of the 4th of June, 1849, the surety would have had a right to a literal performance of the terms of the letter, whether material or not. (*Dobbin v. Bradley*, 17 Wend. 422; *Birkhead v. Brown*, 5 Hill, 634.) But that is not this case, and it is needless to speculate upon the supposed cases.

It would be an unwarrantable stretch of the evidence to say that it was an understood condition of these defendants' liability that the credit was to be availed of only in bills drawn by Smith Cutter, jr., or in the name of Caffé & Cutter.

It is conceded that they occupy the position of sureties to Caffé and Cutter, but not in the sense of strict guarantors of an agreement containing restrictions and limitations and to which they were parties. They are sureties, as all accommodation endorsers are, who entrust their names to parties for the purpose of a general accommodation, without restriction, though in a particular transaction, and the cases of *Powell v. Waters*, (17 J. R. 176;) *Bank of Chenango v. Hyde*, (4 Cowen, 567;) and *Bank of Rutland v. Buck*, (5 Wend. 66,) show, that where general accommodation is the object, even if it be understood by all the parties that the accommodation is to be secured in a particular way, a strict adherence to that mode is not essential, nor a departure from it a misapplication of the paper. We conclude, then, that even if these defendants had been cognizant of, or in any sense, parties to the

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arrangement between the plaintiffs and Caffé and Cutter, the evidence does not warrant them in saying that the mode in which the drafts were actually drawn, was a violation of the conditions of that arrangement.

But it is objected, that by the transfer of the credits to Allain and Co., Caffé and Cutter not only departed from the terms upon which the credit was created, but that they thereby relinquished all control over the credits themselves. This view is not supported by the evidence. This transfer was not a sale or negotiation of the credits—Allain and Co. were merely the agents of Caffé and Cutter, for the purchase of their goods in Paris—every one of their drafts is expressed to be for value received in merchandise, and was directed to be placed to the debit of Caffé and Cutter's account with the plaintiffs, and was so debited. Caffé and Cutter are throughout recognized as the debtors in the account, and the drafts were, to all intents and purposes, the drafts of that firm. If, then, the objection to the mode in which the drafts were drawn fails, the inquiry remains, what were the conditions upon which these endorsements were to become available in the hands of the plaintiffs, in other words, in what event were these endorsers to become liable? and has this event occurred?

By the arrangement between Collomb and Caffé and Cutter, the latter were to remit by the English steamer, in good bills on London or Paris, to be approved of by Collomb, to cover the plaintiffs, for such acceptances as they should make under the credits, and such remittances were to be made, so as to reach the plaintiffs at least fifteen days before their acceptances should become due. The credits were to be renewed so long as Collomb held the security of Youngs and Lavery, provided the remittances were made.

When the second credit was given, (June, 1851,) a new note, endorsed by Youngs and Lavery, or by one of them, was deposited with Collomb for the amount of the credit, and when the final credit of 40,000 francs was granted, their endorsement for that amount was also deposited as security, and no change or variation had occurred in the original terms or conditions of the credit, but they remained precisely as they had been agreed upon when the first credit was opened.

The contingency then upon which these endorsements were to

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become available to the plaintiffs, was the failure of Caffé and Cutter to remit bills on London or Paris, to be first approved of by Collomb, in New York, in such time as to reach the plaintiffs at least fifteen days before the maturity of the acceptances.

The bills were to be approved of by Collomb, before being remitted, so that the default would, in fact, occur whenever Caffé and Cutter failed to present bills to Collomb, in New York, for his approval, in time to allow them to be remitted so as to reach Paris fifteen days before the maturity of the plaintiff's acceptances. Has the contingency happened, and to what extent have the defendants become liable?

Caffé and Cutter appear to have drawn under the first and second credits, from time to time, up to the period when the last credit was given, (12th of October, 1852,) and to have renewed their notes, with the defendants' endorsements, to cover the amount of their drafts, so that at this last period, Collomb held such renewal notes for the full amount of the then existing credit for 85,000 francs.

This covered a period of nearly three years, and considering that the period between the second and last credits exceeded a year, there can be no pretence for saying that the two original credits were not both of them of a permanent character, or that the defendants did not know and assent to their being so.

We are not informed what was the state of the accounts between the plaintiffs and Caffé and Cutter, on the 12th of October, 1852, when the last credit was given, but at that time Collomb held the defendants' endorsements (in renewal notes) to the full amount of the two previous credits. A new arrangement was then proposed by Caffé and Cutter, and assented to by the plaintiffs, by which all the credits were to be consolidated into one, and made an aggregate credit of 75,000 francs, to continue for at least one year, and upon the same terms upon which the original credit had been granted, and although no notice appears to have been given to the defendants of this new arrangement, they were undoubtedly aware of it, for we find their endorsement for the increased amount (40,000 francs) immediately furnished, upon the completion of the arrangement.

We know nothing of the state of the accounts between the parties after this final consolidation of the credits, until June, 1853,

when a balance of over 46,000 francs was due from Caffé & Cutter to the plaintiffs.

This balance was entirely extinguished by remittances of Caffé & Cutter in July and August following. At this period, neither of the notes in suit was due, though outstanding, and had the transaction terminated here, the defendants' liability would have been at an end; but about this period, commenced a new mode of using the credits, and a new series of drafts and acceptances, which has given rise to the present litigation.

In June, July, and August, 1853, Caffé & Cutter direct the plaintiffs to transfer the whole of the credits to Messrs. S. Allain & Co., who, thereupon, drew in five different drafts, commencing August 1st, and terminating October 12th, 1853, for the full amount of the 75,000 francs, all which drafts were accepted by the plaintiffs before the maturity of the notes in suit.

Caffé & Cutter have made no remittances to cover these acceptances, or either of them.

The first of them (20,000 francs) fell due, and was paid by the plaintiffs just after the maturity of the \$8,000 note, and the second of them (for 15,000 francs) shortly after the maturity of the two notes for \$2,000 each, and these were the only two drafts which had either fallen due, or been paid, at the time these suits were commenced.

The suits were commenced on the 8d and 7th of December, 1853.

The two first drafts (35,000 francs) were actually paid, as already stated, before the commencement of the suits. The third draft (15,000 francs) fell due, and was paid, on the 19th of December; approved remittances to meet this acceptance should have reached the plaintiffs at least as early as the 4th of December, which was before the commencement of the suits. In respect to this draft, therefore, there had been a clear default at the time of the commencement of the suits; the two last, each dated 11th Oct., 1853, payable at ninety days, one for 15,000 francs, and the other for 10,000 francs, each fell due and was paid by the plaintiffs on the 9th of January, 1854. In respect to these, if approved remittances had been sent at all, they would have been in time, if they had reached Paris on the 25th of December. The default, in fact, occurred when Caffé & Cutter failed to exhibit bills to Collomb, in

New York, for his approval in time to be transmitted, so as to reach Paris on that date. What period this would have required, at that time, we are not informed, and do not know. In respect, therefore, to these two drafts, it cannot be said that at the commencement of the suit, Caffé & Cutter were in default. They were, however, paid before the time. It is clear that there had been a default on the part of Caffé and Cutter, under their agreement with the plaintiffs, in respect to all the drafts except the two last, at the time these suits were commenced.

The question then arises, to what extent are the plaintiffs entitled to recover in those actions?

The defendants contend that, in any event, they are liable only to the extent of two drafts, (35,000 francs,) which had matured and been paid at the time of the commencement of the actions; and it is further contended on the part of Mrs. Catlett, that the \$8,000 note was applicable exclusively to the credit of 40,000 francs, and that, therefore, the plaintiffs can only recover, as against her, the amount of the \$2,000 note, the only one, as she claims, on which Laverty has been sued, which is applicable to the drafts for the 35,000 francs.

The plaintiffs, on the other hand, claim that they are entitled to judgment for the full amount of the notes against the parties to them, that is, as against the executrix of Laverty, the amount of the two notes, one for \$8,000 and the other for \$2,000, (50,000 francs,) and as against the other defendants, the amount of all the four notes, \$15,000, (75,000 francs.)

When the credit was finally raised to 75,000 francs, all discrimination in the amounts of the several credits which constituted the aggregate sum appears to have been dropped, and though the \$8,000 note is expressed in Collomb's letter to plaintiffs of 12th of October, 1852, to be the guarantee upon the 40,000 francs augmentation of the previous credits, the meaning of the expression must be gathered from the whole of the facts then existing. It was a final arrangement for a permanent credit for the larger amount; and the notes then held, as well as the \$8,000 note then received, were to be considered as the guarantee for the fulfilment of the conditions originally agreed upon, when the first credit was opened.

It would be unreasonable to suppose that the parties intended

that each note should remain as a security for the particular credit only, on which it had been originally given, which would necessarily lead to endless confusion, unless care was taken that each draft was drawn upon a particular credit. On the contrary, the evidence of Collomb is express, that the notes were deposited as security for all the credits, and that the drafts were drawn against the credits generally, without discrimination.

I conclude, therefore, that such was the understanding of the parties, and that the notes must all be treated as on the same footing, and as constituting together a common security for the entire amount of credits. In legal effect, the case is the same as though the notes had all been consolidated into one, or as if, instead of endorsed notes, the form of the security had been a bond for the entire amount, with Laverty & Youngs as sureties, and conditioned for the performance, by Caffé & Cutter, of the stipulations of their agreement with Collomb.

It is like the case of a suit on a bond payable in instalments, in which, on default in payment of one instalment, the plaintiff takes judgment for the whole penalty, and issues execution for the amount actually due, and so from time to time, under leave of the court, as subsequent instalments become due.

It follows that, on default of Caffé & Cutter, in making remittances to meet any one draft, the plaintiffs became entitled to sue upon all the notes, and to take judgment for the aggregate amount of all, as they would have been entitled to do, had the security been in the form of a bond, and, as all the drafts had been taken up and paid by the plaintiffs before the verdict was obtained, and it is conceded that Caffé & Cutter never made a remittance to meet either, there can be no objection to the plaintiffs taking their judgment for the full amount of the notes in each suit, and issuing execution accordingly, provided that the whole amount to be levied under the two judgments do not exceed, exclusive of costs, interest and charges, the sum of the said acceptances and commissions, with interest thereon; and provided further, that the judgment against Mrs. Catlett is to be levied of property in her hands, or to come into her hands as executrix, and out of her individual property.

An objection was taken, at the trial, that the plaintiff's firm was changed, in July, 1852, by the withdrawal of Respinger, one of

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partners, and the accession of Krauss, a new member. Whatever force this objection might have had, under other circumstances, I do not think it well taken here. The change took place before either of the notes in suit was made, and the firm continued the same.

An objection was also taken, on the trial, to the sufficiency of the proof of the endorsement, by Le Roy de Chabrol & Co., of the drafts, of the 1st of August and 11th of October. We think this objection was properly overruled.

The acceptance of the draft is not denied, nor is the omission to make remittances, to meet the acceptances, denied. It was that default, on the part of Caffé & Cutter, which was to render the defendants liable, on their endorsements. Whether the holders could have recovered, against the drawees, in a suit upon the drafts, on this proof of the endorsements, may be questionable. But that cannot affect the question of the liability of Caffé & Cutter, by reason of their failure to make remittances.

An objection was also taken, at the trial, by the counsel for Mrs. Catlett, to the reading of the depositions, under the commission, on the ground, that the cross-interrogatories were not sufficiently answered. We think the objection was properly overruled, as it is very clear that all the cross-questions are, in fact, answered; and, so far as the objection points, fully answered. The special question, omitted to be fully answered, should have been pointed out. But, apart from this, the defendant's counsel was aware of the defect, some months before the trial. If the objection had been deemed sufficiently serious, a motion should then have been made to quash the return of the commission. If that motion had then been made, and prevailed, the plaintiff would have had time to remedy the defect, by a second commission, before the trial. It would be unfair, to prejudice him by a surprise, on the trial, under such circumstances. (19 Wend. 437.)

For the like reason, we think the objections, on the part of the other defendants, though more serious in character, should not prevail. Good faith and fair practice required, under the circumstances, that they should have been taken before the trial.

Judgment must be for the plaintiffs, in each action, in conformity with the views expressed in this opinion.

WILLIAM H. MELLEN v. THE HAMILTON FIRE INSURANCE
COMPANY.

An assignee, for the benefit of creditors, to whom, among other property, a policy of insurance was assigned, after a fire had occurred, may sue in his own name, without those provided for by the assignment being made parties, to recover the loss.

An assignment of this character is not within the meaning of the clause in policies, requiring the written consent of the assurers, to an assignment. It is merely the transfer of a debt.

An insurance was effected, by the plaintiff's assignor, with the defendants, on the 12th of April, 1854. On the 23d of June, 1854, he effected another insurance, with another company. The fire took place on the 13th of July, 1854, and the preliminary proofs were furnished on the 26th of that month. No notice of such further insurance was given to the company, until that time, and accompanying such proofs.

Held, that this was not a compliance with the provision of the policy, requiring the assured to give notice to the company, with all reasonable diligence, of any further insurance that might be effected by him; and the policy was made void by such neglect.

The knowledge of such other policy by an insurance broker, who procured the policy, for the plaintiff's assignor, with the defendants, is not the knowledge of the company, to bind them. There was no proof of his being such a general agent as would make the company responsible for his acts or knowledge.

(Before DURN, BOSWORTH and SLOSSON, J.J.)

Heard, October term; decided, December term, 1855.

MOTION for judgment, on a verdict taken, subject to the opinion of the court on the whole case, to be heard, in the first instance, at General Term, with liberty to direct a dismissal of the complaint, and with liberty to either party to turn the case into a bill of exceptions.

The action was brought upon a policy of insurance, dated the 12th of April, 1854, for \$2,000, executed by the defendants, in favor of Mark O'Brien, upon a stock of goods, in a store No. 216 Bowery. The policy was assigned, by O'Brien, to the plaintiff, after the fire, for the benefit of creditors. The fire occurred on the 13th of July, 1854.

The policy is set forth in the complaint, and is in the usual form. It contains the clause, "that if the said insured, or his assigns, shall

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thereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to these defendants, and have the same endorsed on the said policy, or otherwise acknowledged by them, in writing, the policy shall cease, and be of no further effect."

The defence was, that, since the making of the policy, and before the fire, the said O'Brien, without the knowledge or assent of the defendants, procured a further and other insurance, upon the same property covered by this policy, in the St. Nicholas Fire Insurance Company, of the city of New York, to the extent of \$1,000; that such policy was made, and issued, on the 23d of June, 1854; and that no notice was given to the defendants of such further or other insurance.

Another ground of defence was, that, by the terms of the policy, it could not be assigned, without the assent of the defendants, manifested in writing; and that no assent had been given, to the assignment to the plaintiff.

The assignment, which was produced in evidence, was of this and certain other policies of insurance, in trust, to pay certain scheduled creditors, fully or *pro rata*.

The policy, and the loss and value, having been proven at the trial, as well as the subsequent policy, effected at the St. Nicholas Insurance Company, and no evidence of the assent of the defendant to such subsequent insurance being given, a motion was made for a nonsuit, which was denied, and such refusal was duly excepted to.

W. A. Butler and J. T. Brady, for the plaintiffs.

They cited 5 Hill, 101; 9 John. 191; 14 John. 20; 6 Cow. 645; 23 Wend. 18.

A. Wakeman, for the defendants.

He cited 16 Peters, 495; 4 Howard, 185; 5 Hill, 147.

BY THE COURT. DUER, J.—The objections taken on the trial to the sufficiency of the preliminary proofs, and to the right of the plaintiff to maintain the action in his own name, were properly abandoned on the argument before us. Where an action is

brought by a trustee, in whom the legal title is vested, it is certainly not necessary that the *cestui que trust* should be made parties, either as plaintiffs or defendants, unless where the action is brought for the purpose of determining, or involves the determination of, their respective rights and interests under the instrument creating the trust.

The objection, that the assignment to the plaintiff was made without that consent in writing of the defendants which the policy requires, although not abandoned upon the argument, is, in our opinion, quite as untenable as those that have been mentioned. The restrictive clause in the policy, upon which the objection is founded, refers only to an assignment of the policy during the pendency of the risks, and accompanying the transfer of an interest in the property insured. Thus interpreted, there are evident reasons for its introduction; but when the assignment is made, as in the case before us, when the risks have ended, for the sole purpose of enabling the assignee to recover a loss, it is, in reality, no more than the assignment of a debt, which, as the company has no motive of interest for preventing, it would be unreasonable to suppose, was meant to be prohibited. This limited interpretation of the clause was adopted by this court many years since in the case of *Brichta v. the Lafayette Ins. Co.*; and as we see no reason to doubt the propriety of the decision, and are not aware that it has ever been departed from, we hold ourselves bound to follow it. (2 Hall's S. C. Rep. 372, and also, *Lazarus v. Commercial Ins. Co.*, 5 Pick. 79, and 2 Duer on Ins., pp. 64-66.)

The plaintiff would be entitled to judgment were there no other objection to his recovery; but an objection remains to be stated, to which no answer, that we can deem satisfactory, has been given. It is insisted, that before the happening of the loss, the insurance had been rendered void by the violation, on the part of the assured, of that provision in the policy which made it his duty to give notice to the company, with all reasonable diligence, of any further insurance that might be effected by him, and have the same endorsed on the policy, or otherwise acknowledged by the company in writing. A further insurance was effected by him on the 23d June, 1854. No other notice of the fact was given to the company than that contained in the preliminary proofs, upon which payment of the loss was demanded; and those, the case

shows, were not made up and served until the 26th of July following. The delay, it is contended, was unreasonable, and has not been justified or excused.

On the part of the plaintiff two replies have been made to the objection. *First.* That the witness Wales was the general agent of the defendants; and that, as the subsequent insurance was procured by him, his knowledge of the fact was equivalent to notice to the company; and several adjudged cases were referred to as sustaining this position. *Second.* That there was no want of reasonable diligence, even on the supposition that no other notice was given to the company than by the service of the preliminary proof.

Neither reply can we hold to be sufficient.

The allegation that Wales was the general agent of the defendants, to whom a notice, binding on the company, of a subsequent insurance, could properly be given, is not only not sustained, but in our opinion, is plainly contradicted by the evidence. He was an insurance broker, and from the nature of his business as such, was no more the general agent of the defendants than of any other company or individuals to whom his professional services had been rendered. In procuring the insurance he was the agent of the assured, and if, before the transaction was complete, he became, for any purpose, the agent of the defendants, that agency wholly ceased, when he had delivered the policy to the assured, and had paid over to the company the premium which he had received.

From this time, there was no such relation between him and the defendants, as could make it his duty to communicate to the company his personal knowledge of a subsequent insurance, or could justify third persons in believing that this duty was imposed on, and would be discharged by, him; and we think it would be extravagant to say, that the knowledge which, in a separate transaction, he acquired of a further insurance, was alone sufficient to affect the company with notice of the fact. The cases, therefore, to which we were referred, bear no analogy to the present; and it is needless to consider whether we should have held them to be applicable or controlling, had the general agency of Wales, or the fact that he was held forth to the public by the defendants as such agent, been established on the trial. The question whether, had express and timely notice of the subsequent insurance been given

to the defendants, they might not, by refusing to endorse it on the policy, or otherwise to acknowledge it in writing, have discharged themselves from all further liability, we shall also leave undecided.

The sole question that remains is, whether there was such a want of reasonable diligence on the part of the assured, in giving the notice which the policy requires, as rendered the insurance void at the time of the fire; for if it was then in force, the defendants are certainly liable, and the notice given by the preliminary proofs may well be deemed sufficient. As the facts are undisputed, this question was treated by the counsel, and is regarded by us, as purely a question of law; and its proper determination as such, it seems to us, is not, at all, difficult or doubtful. If the only purpose for which notice of a subsequent insurance is required, were that of enabling the prior insurers to ascertain for what proportion of a loss they might eventually be liable, then, until the actual occurrence of a loss, no such notice would seem to be necessary; since, if given then, it would fully answer the purpose for which alone it was intended, and a delay, working no prejudice to the insurers, could not justly be qualified as unreasonable. But this is not the only, or, as we apprehend, the principal reason for requiring that express notice of every further insurance upon the same property shall be given. By one of the conditions annexed to the policy, the company may elect at any time, and for any cause, to terminate the insurance by giving notice to the assured, and returning a due proportion of the premium; and to enable an insurance company to exercise properly this discretionary power, it is important, that it should have a timely knowledge of the facts upon which its exercise will usually depend. Of these facts, there is probably none more important to be known, than that of the total amount of the sums insured upon the same property, since it is by a comparison of this amount with the value of the property, that prudent insurers, in making the election which the policy gives to them, are certain to be governed. Hence it is, that the fact of a further insurance is required to be made known to them with "all reasonable diligence," instead of deferring its communication until the happening of a loss. We think, therefore, that the words "reasonable diligence," looking to the purpose for which they are inserted, demand promptitude of action, and ex-

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clude unnecessary delay; and, consequently, that an unexplained delay of nineteen days is conclusive proof of a want of that "reasonable diligence" which was necessary to be shown to continue the policy in force. We think that it was not in force when the fire happened, and that the loss claimed is, therefore, not recoverable.

The verdict must be set aside, and the complaint be dismissed with costs.

ARTHUR LYSAGHT v. JONAS PHILLIPS.

The defendant, at the request, and for the accommodation of L. P. & Sons, of London, drew a bill of exchange upon them, which they accepted, for £1,804 17s. 5d. But the acceptors placed the bill in the hands of another house, to be discounted for their benefit, and this house transferred the bill, before its maturity, to the plaintiff, as collateral security for the repayment of a loan of stock.

Held, that the finding of the referee, that the bill had been transferred to the plaintiff for a valuable consideration, and without notice of its misapplication, was sustained by the evidence.

The acceptors failed, and after their failure entered into a deed of composition with their creditors, to which both they and the plaintiff, as one of the creditors, were parties. The deed contained an absolute release of the acceptors, and also a covenant not to sue them, but it contained also a reservation of the rights and remedies of the creditors against third persons, not parties to the deed, who were or might become liable as drawers, endorsers, or otherwise.

Held, that the effect of this reservation was, not only to preserve the plaintiff's right of action against the defendant, but to continue the liability of the acceptors to the defendant, in case he should be compelled, as drawer, to pay the bill, and that consequently the release and covenant in the deed, as they did not affect the rights of the defendant, constituted no defence to the present action.

Judgment for plaintiff affirmed, with costs.

(Before DUFF, BOSWORTH and SLOSSON, J.J.)

Heard, October; decided, December, 1855.

MOTION for a new trial, upon a report of a referee, and an appeal from a judgment entered thereon, on the ground of its being contrary to evidence, and for error in matters of law, as to which exceptions were taken to the decision.

The action was by the plaintiff, as holder and endorser of an accepted bill of exchange, against the drawer, upon protest of the same for non-payment, and notice to him.

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The bill was dated 30th August, 1847, at sixty days' sight, drawn by Jonas Phillips & Co., of New York, on Lawrence Phillips & Sons, of London, for £1,304 17s. 5d., to the order of the drawers, and endorsed by them and by Lysaght, Smithett & Co., of London. It was duly accepted, but protested for non-payment 17th November, 1847.

The cause was tried before the Hon. William Kent, as referee.

The referee found as facts, that the bill "was drawn by the defendant, at the request and for the accommodation of the firm of Lawrence Phillips & Sons, aforesaid, (the acceptors,) and that no value or consideration passed from the said last-mentioned firm to the said defendant, for or on account of the said bill of exchange."

The bill was delivered by the acceptors to Sargeant, Gordon & Co., to get discounted for the acceptors; and Lawrence Phillips & Sons never received any consideration or value for it, and never received it back. Sargeant, Gordon & Co. delivered it to Lysaght, Smithett & Co., without any consideration, to be discounted for them, Sargeant, Gordon & Co. and never received any value for it.

The plaintiff, Arthur Lysaght, was a vice-admiral in the British navy, and was examined as a witness on the part of the defendant. There was no other evidence of his title to the bill than his own. He says, "The bill was handed to me by Messrs. Lysaght & Smithett, of London, in consideration of my having advanced £6,000 stock, 3½ per cent. It was endorsed to me by Messrs. Lysaght & Smithett, and handed over with other bills. I produce a letter which covered the bills."

This letter is dated London, November 6, 1847, addressed by Lysaght, Smithett & Co. to the plaintiff. Its language is, "In consideration of your having advanced to us the sum of £6,000 of 3½ per cent. stock, we hereby lodge with you the undermentioned securities, which we authorize you to dispose of in any way you may think fit, on our failing to replace in your name the same amount of stock in the course of the present month."

The letter inclosed bills to the amount of £7,468 13s. 5d.

The notice of the protest of the bill was served upon the defendant in New York, on the 10th December, the bill having matured the 17th November, twenty-three days before. There

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was no evidence of the time when the notice was transmitted from London, but the witness who served the notice stated that he had received the bill protested by the earliest conveyance.

Lawrence Phillips & Sons; Sargeant, Gordon & Co.; and Lysaght, Smithett & Co., failed before the maturity of the bill, and their estates passed into the hands of inspectors. Dividends, amounting in the whole to 12*s.* and 2*d.*, were declared by the various assignees, and some of the dividends have been received by the plaintiff.

The deed of inspection on the estate of Lawrence Phillips & Sons, is set forth in the case, and is executed by the plaintiff, as a creditor for the bill in suit.

By this deed the plaintiff agreed—

1. To the assignment of the estate of Lawrence Phillips & Sons, to James Bonar, Edward Howley Palmer, and David Hoes, as inspectors.

2. To grant them a letter of license during such inspectorship.

3. To give the inspectors full power and discretion.

(a.) To pay creditors under £25 in full.

(b.) To make compromises.

(c.) To allow the partners for their services.

(d.) To release the partners after a dividend.

4. That the household property of each partner should be retained by him.

5. To the retaining, by the partners, of a subsistence or allowance out of the estate.

6. To be governed and controlled, as to his interest in the estate, from time to time, by the vote of a majority of the creditors.

7. To the absolute control of his interests by the inspectors.

8. That unless a fiat in bankruptcy should be issued by some creditor not signing, or the inspectors should certify to a wilful default by the debtors, he would not sue, seize, or attach.

9. That if this latter agreement should be violated, it should operate and might be pleaded as a full and general release of the debt.

10. That upon the certificate of the inspectors, of performance by the debtors, "these presents shall operate and enure as a full and general release from all and every of the said creditors, * * * to the said parties hereto of the first part, * * * and may

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be pleaded in bar as a good and effectual release and discharge of all, and all manner of actions, suits, bills, claims and demands whatsoever, both at law and in equity."

The deed, then, contains the following clause:—"Provided, always, and it is hereby agreed and declared by, and between the said parties to these presents, that nothing herein contained, shall extend, or be deemed or construed to extend, to prevent or hinder the said several parties hereto of the second and third parts, or any of them, or their or any of their partner or partners, heirs, successors, executors, administrators, or assigns, from enforcing or otherwise obtaining the full benefit and advantage of any charge or lien which they, or any of them, now have or hath upon any estate or effects whatsoever, or from suing or prosecuting any person or persons other than the said parties hereto of the first part, or either of them, their respective heirs, executors or administrators, who is, or are, or shall, or may be liable or accountable to pay, or make good to the said several parties hereto of the second and third parts, or any of them, or their, or any of their partners or partner, executors, administrators, or assigns, all, or any part of their said respective debts, either as drawers, endorsers, or acceptors of any bill or bills of exchange, or promissory note or notes, or as being jointly or severally bound in any bond or bonds, obligation or obligations, or other instrument or instruments, or as being liable or accountable for the payment of any such debt or debts, without having subscribed any bill, note, or other instrument whatsoever or otherwise, as if these presents had never been made."

The inspectors, in pursuance of the power given them in the deed on the 31st of December, 1849, certified that the acceptors ought to be released, on paying a dividend of 1s. 2d. in the pound, in addition to the dividend of 5s. previously paid.

This further dividend was provided and ready for the plaintiff, but he avoided taking it. The referee reported as follows:—

To the Justices of the Superior Court of the city of New York:—

The undersigned, a referee in the above entitled action, appointed by the honorable court, respectfully reports:—

That he has been attended by the attorneys of the respective parties, plaintiff and defendant, and has heard the proofs and al-

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legations of the parties, and the arguments of the counsel thereon, and having duly considered the same, he finds as facts in this action—

That the defendant, under the name of Jonas Phillips & Co., made and drew the certain bill of exchange in the complaint described, addressed to the persons doing business in the name of Lawrence Phillips and Sons; also, in the pleadings in this action mentioned, which bill of exchange was made payable to the order of the said Jonas Phillips & Co., and was endorsed by, and with the name of the said Jonas Phillips & Co.

That the said bill of exchange was accepted by the said firm of Lawrence Phillips and Sons, as stated in the said complaint.

That the said bill of exchange was drawn by the defendants at the request, and for the accommodation of the firm of Lawrence Phillips and Sons aforesaid, and that no value or consideration passed from the last-mentioned firm to the said defendant for, or on account of said bill of exchange.

That the said bill of exchange, endorsed as aforesaid, was, before its maturity, transferred and delivered to the plaintiff for a good and valuable consideration; and that the said plaintiff became, and was the *bonâ fide* holder thereof.

That the said bill of exchange was duly presented for payment, as stated in the complaint, and payment thereof demanded and refused, as in the complaint stated; and the said bill of exchange was protested for non-payment, as in the complaint stated, and that notice of said presentment, demand, non-payment, and protest was given to the defendant, as in said complaint alleged.

That some time thereafter, to wit, on or about the 7th day of April, 1848, a certain indenture was made between the persons, comprising, as aforesaid, the said firm of Lawrence Phillips and Sons, of the first part, and James Bonar and Edward Hawley Palmer of the second part, and several other persons, of whom the plaintiff was one, being creditors of Lawrence Phillips and Sons, of the third part, such deed being known in the law as a deed of inspection, which said deed is set forth in the schedule hereto annexed, marked A, to which the referee refers, and makes part of this his report.

And as matter of law, the said referee decides and adjudges that the said plaintiff did not, by said deed, nor in any other manner, so far as the said referee is advised, release or discharge the said de-

defendant from his liability, upon or by reason of said bill of exchange.

And further, that the said plaintiff, upon the facts of this case, is entitled to recover against the defendant the amount of said bill, together with ten per cent. damages thereon, and interest on said amount of said bill and damages, less the credits allowed in the complaint as claimed in said complaint, besides the costs of suit to be taxed, which said amount of said bill, damages and interest, to the date of this report, is the sum of \$7,400.62.

The referee decides that judgment be entered in this cause for the plaintiff against the defendant, for the sum of \$7,400.62, with costs to be taxed.

W. KENT, Referee.

The deed of inspection referred to as annexed to the report, has been before stated, as far as it is material.

J. Larocque, for the defendant, the appellant, contended that the judgment upon the report of the referee ought to be reversed, and a new trial be granted, upon several grounds.

I. That there was no sufficient evidence that the notice of protest of the bill had been transmitted from London in due season. (5 Cowen, 863.)

II. That the finding of the referee, that the bill, before its maturity, had been transferred to the plaintiff for a valuable consideration, and that he was a *bonâ fide* holder thereof was against evidence. That the fair result of the evidence was, that the only consideration of the transfer was a precedent debt.

III. That the necessary legal effect of the release of the acceptors in the deed of composition, was to discharge the defendant, as drawer, from all liability; and that the reservation of the plaintiff's rights and remedies against the defendant, did not bar the case from the operation of the general rule of law.

And, lastly, That the covenant in the deed, by which the plaintiff bound himself not to sue the acceptors for a definite period, operated of itself, as a release of the debt, and of the defendant as the surety of the acceptors, and that this was not helped by the reservation. In support of this last point he cited the following cases. (*Rathbone v. Warren*, 10 John. 589; *Manch. Iron Manufacturing Co. v. Sweeting*, 10 Wend. 162; *Hoffman v. Hulbert*, 13

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Wend. 375; *Bonchard v. Dias*, 3 Denio, 238; *Fellows v. Prentiss*, 3 Denio, 512.)

W. M. Evarts, for plaintiff, insisted that the evidence clearly established that the plaintiff had received the bill before maturity, and without notice, and was therefore entitled to judgment for the balance due, unless he had so released the acceptors, as to discharge the defendant as drawer; and that the release of an acceptor is never available as a defence to the drawer, unless it has the effect of depriving the drawer, in case of a payment by him, of any right of action over against the acceptor; and he contended that it was clear, upon the authorities, that the reservation in the deed, to which the acceptors were parties, operated as a valid agreement by them, that if the defendant should pay the bill, the release should not be interposed as a defence to any future action that he might bring against them for such payment. He cited, among other cases, the following: *Stewart v. Eden*, 2 Caines, 121; *Keasley v. Cole*, 10 M. & W. 128; *North v. Wakefield*, 13 Queen's B. 336; *Nichols v. Norris*, 3 B. & Adol. 41; *Mallby v. Clairstairs*, 1 Mann. & Ryl. 549; *Owen v. Hiram*, 13 Beav. 196.

BY THE COURT. SLOSSON, J.—The two material questions in this case, are:

1 Whether the plaintiff is a *bona fide* holder, for value, of the bill in question.

2 Whether, if he be such a holder for value, he has not, by executing the inspection deed of April 7th, 1848, released the defendant from his liability as drawer of the bill.

First. The referee has found that the bill was drawn by the defendant, for the accommodation of Lawrence Phillips & Sons, (the acceptors) without any consideration having passed from the latter to the former. The evidence shows that Lawrence Phillips & Sons, delivered the bill to Sargeant, Gordon & Co., to get discounted for them; who, instead of doing this, delivered it to Lysaght, Smithett & Co., to be discounted, and the proceeds to be paid to them, and that this latter firm, instead of procuring the bill to be discounted, transferred it to the plaintiff as security for a debt of their own.

The question then is, what was the consideration which the plaintiff paid or gave for the bill?

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The bill being confessedly a mere accommodation bill, as respects the defendant, the drawer, and no value having been given therefor by any of the intermediate parties, its validity as an obligation, on the part of the defendant, depends on the question whether the plaintiff received it for value, and without notice of its previous misapplication; and the burden of showing value is on him. It is not disputed that he received it before maturity. As it was an accommodation bill, without restriction as to the manner in which it was to be used by Lawrence Phillips & Sons, had they transferred it to the plaintiff even as security for an antecedent debt, the defendant could not have objected the want of value in his hands. (*Grandin v. Le Roy*, 2d Paige, 509; *Lathrop v. Morris*, 5 Sandf. 7.)

But it was actually diverted from the purpose for which it was made by those to whom Lawrence Phillips & Sons, for whose accommodation it was made, delivered it; and that firm never received any benefit from it. In such a case, the taking of the paper as security for a pre-existing debt, is not such a parting with value, by the transferee, as to make it available in his hands against the accommodation party to the bill. (*Stalker v. McDonald*, 6 Hill, 93.)

The defendant contends that it is evident, both from the testimony of Lysaght, the plaintiff, and the letter of Lysaght, Smithett & Co., to him, of November 6th, 1847, that the plaintiff received the bill as a security for an advance previously made by him to that firm. The language both of the witness and the letter is ambiguous, and is certainly easily susceptible of the interpretation put upon it by the defendant's counsel. They both speak of the plaintiff's having advanced the £6,000 of stock as security, for the replacing of which the acceptance was deposited.

The referee has found that the bill was transferred for a good and valuable consideration, which, under the circumstances and law of the case, can only mean a consideration at the time of the transfer, and the question is, whether this finding is against the evidence. The letter, taking all its expressions together, is certainly not inconsistent with this finding, however susceptible it may be of the opposite interpretation. It authorizes the plaintiff to dispose of the securities of which this draft was one, on the failure of Lysaght, Smithett & Co., who deposited them, to replace in the

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plaintiff's name the same amount of stock in the course of the then present month, language which would naturally imply a loan of the stock, made at the time the securities were deposited. The language used by the plaintiff, in his testimony, is susceptible of the like interpretation. At all events, the finding of the referee is not so clearly against the evidence as to warrant us in disturbing it on this account.

Second. Does the inspection deed of April 7th, 1848, operate to discharge the liability of the defendant, as drawer of the bill in question. It is executed by Lawrence Phillips & Sons, the acceptors of the bill, of the first part, the inspectors, of the second part, and the creditors of that firm, of the third part, among whom is the plaintiff in this action, who appears to be a creditor in respect to this bill only.

It provides, among other things, that unless and until a fiat in bankruptcy shall be issued against the parties of the first part, or unless and until the inspectors should certify to a wilful default on the part of said parties of the first part, in the performance of some material covenant therein contained, &c., the creditors will not commence or prosecute any action, or suit at law or in equity, against them or either of them, or make any seizure or attachment, &c.; and that, in case any creditor should commence or prosecute such action or other proceeding, then the instrument was to operate, and might be pleaded, as a full and general release of all and every the debts, claims and demands of such creditor. The deed then provides, that, upon the inspectors' certifying that the parties of the first part ought to be released from their partnership debts, either simply and absolutely, or upon their complying with certain conditions therein specified, then, upon their compliance with such conditions, if prescribed, or immediately upon the signature of such certificate, the deed was to operate and enure, and might be pleaded as a full and general release and discharge, by creditors signing it, from all actions, debts, claims and demands whatsoever, both at law and in equity, which such creditors had or might have, by reason of their several claims, or of any other matter, cause or thing whatsoever, in respect of said debts and liabilities, or any of them; and then follows a promise and agreement, between all the parties, that nothing therein contained should extend, or be construed to extend, to prevent the creditors "from suing or

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prosecuting any person or persons, other than the parties of the first part," "who is or are, or shall or may be, liable or accountable to pay, or make good to them, all or any part of their respective debts, either as drawees, endorsers, or acceptors of any bill of exchange, promissory note, &c., &c., or as being liable or accountable for the payment of any such debt or debts, without having subscribed any bill, note, or other instrument whatsoever, or otherwise, as if those presents had never been made." The deed contains, furthermore, a recital, that the creditors "signed the agreement, under the express reservation of all the securities they held."

If the legal operation of this release, or covenant not to sue, whichever its construction, be to deprive the drawer (the defendant) of his resort to the principal debtor, (the acceptors of the bill,) then, unquestionably, he is discharged. No principle is better settled. But if the effect of the promise, by which the plaintiff reserves his right of action against the drawees of the bill, be to continue the liability of the acceptors to the drawees, in case the latter are sued, then the covenant constitutes no defence to this action; and upon this question my mind is very clear. Lawrence Phillips & Sons, the acceptors, are parties to this deed. The reservation of the rights of the plaintiffs, against the drawer of the bill, is, therefore, with their assent. Such a reservation would be ineffectual, unless the drawer, in case he is sued, might resort to the acceptors for indemnity. The relative position of the drawer and acceptors, as principal debtor and surety, is not changed by the agreement between the creditor and acceptors; and the drawer can only be sued as a party standing in the position of surety for the latter. When, therefore, the acceptor accepts a release from the creditor, with a reservation of the latter's right to sue the drawer, he, in effect, assents to remain bound to the drawer, in the contingency of such a suit being brought against the latter. Any other construction would render the proviso unmeaning. The covenant not to sue, must be limited to the acts of the creditor, and the proviso must be construed as limiting the discharge of the acceptors by the rights of the drawer, who, by agreement of the acceptors, is thus still to remain liable.

The test of the question is, whether the acceptors could set up this deed, in bar of an action against them by the defendant, in the present suit? If they could, the defendant in this action is

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discharged; that they could not, is very clear, if the intention of the parties is to be regarded, in the construction of the instrument. The courts, in construing instruments of this kind, have adhered to this intention, when manifest, and not in conflict with some fixed and inflexible rule or policy of the law, as the standard, or test, by which it is to be interpreted—adopting the equity rule, which will not permit even an absolute release to operate, beyond the clear intention of the parties.

An unqualified release, or covenant not to sue the acceptor, would undoubtedly release the drawer; but a release of the acceptor, except from such liability as he may be under to the drawer, or, which is the same thing, with a reservation of the creditor's rights against the drawer, is a qualified covenant or release only, and limited to the acts of the creditor himself, and is, consequently, no defence, as against an action on the part of the drawer.

The construction of these inspection or composition deeds, in their effect upon the rights of sureties, has undergone much discussion in England, where they appear to have become a favorite, as they certainly seem to be, a very wise and beneficent mode of administering the estates of insolvents; but the result has been, clearly to establish their validity as operative covenants not to sue the principal debtor, while, at the same time, the rights of the creditor against the surety, and of the surety against the principal, are, by virtue of the reservation contained in the deed, fully preserved. A very recent case, in the Queen's Bench, *Price et al. v. Barker et al.* (30 L. Eq. R. 157,) has definitely settled the question, in that country, at least, for the present; and, on a similar deed to the one in question in the present action, the court held, as the result of the authorities, "that a covenant not to sue, qualified by a reserve of the remedies against the sureties, is to allow the surety to retain all his remedies over against the principal debtor; and that the covenant, not to sue, is to operate only so far as the rights of the surety may not be affected."

On this whole subject, see also 1 Parsons' Contr. 236; *Kirby v. Taylor*, 6 J. C. R. 242; *Stewart v. Eden*, 2 Caines, 121; *Owen v. Hernan*, 13 Beav. 196; *Solly v. Forbes*, 2 Brod. & Bing. 38; *Clayell v. Salmon*, 5 Gill & John. 314, where the general doctrine is fully sustained.

A case in our own court, *Mottram v. Mills*, (2 Sandford, 189,) is

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relied upon by the defendant, as establishing a different doctrine, and as holding, that a promise like the one in question in a composition deed of like nature, does not operate as a reservation of the rights of the creditor against the sureties, nor, consequently, of the rights of the latter against the principal debtor released. That case appears to have been decided upon a point, which the facts, in the present action, do not present. The acceptors of the bills, in that case, had, at the time of their failure, in their possession, large consignments from the drawer, against which the bills had been drawn, and also bills of lading of other goods, then on the way, consigned to them in the same manner, and in respect to which it does not appear they had, as yet, made any acceptances; and they had also actually received some £11,000 of the proceeds of previous consignments, in excess of what they had paid of the defendant's bills, and which was a clear debt from them to him. And the case showed, that, on applying all they had thus received, and were yet to receive, under the bills of lading then in their possession, and charging the defendant with all the payments which the acceptors had already made for him, and with the amount of the outstanding bills, (£22,000,) there would still be a balance in his favor. By the terms of the agreement, the acceptors were to transfer to the trustees, who were parties to the instrument, all the goods thus consigned to them by the drawer, and the bills of lading then in their possession, with a certain surplus in the hands of another house, belonging also to the drawer; all which were to be applied in extinguishment of the bills, and this constituted the consideration to the creditors (the plaintiffs) of the release, or covenant not to sue the acceptors. In other words, the consideration consisted in a transfer, to the trustees, of the drawer's own property, as a fund with which to take up the bills; and the court seem to have considered this as decisive, in the construction of the instrument. "There was no reservation," say the court, "of the rights of the holders of the bills against other parties, as is attempted in the composition deed. It was an agreement, upon a valuable and sufficient consideration, and was fully performed, on the part of Major & Wallace, (the acceptors.) The plaintiffs were, therefore, obligated, according to its terms, never to sue, &c. There would have been more difficulty in sustaining the defence, if it rested wholly upon the stipulations in the compromise deed, but we are

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spared the necessity of deciding the point. On the other ground, the defendant is entitled to judgment."

We do not consider this case as at all decisive upon the effect of a reservation in a deed like the one at bar; but regard it as a case decided on in its own peculiar circumstances, and as leaving entirely open the question of the construction of a proviso in a composition deed, given under other and different circumstances.

We have not adverted to the point made, that notice of the protest for non-payment was not in time, as we consider the contrary too clear for argument.

The judgment on the report of the referee is affirmed with costs.

ROBERT P. WIGGIN v. JOHN ORSER, Sheriff, &c.

As a general rule, an action under the Code is not commenced until the actual service of the summons.

The only exceptions are those created by §§ 99 and 185 of the Code. The first exception is confined to cases in which the statute of limitations is set up as a defence. The second, to actions against non-resident or absconding debtors, and foreign corporations.

Hence, in an action against a sheriff for an escape, the voluntary return of the prisoner before the actual service of the summons, although after its delivery to the coroner, is a good defence.

Judgment dismissing complaint, affirmed with costs.

(Before DURE, CAMPBELL and HOFFMAN, J.J.)

December term, 1855.

APPEAL by the plaintiff from a judgment dismissing the complaint.

The action was against the sheriff of the city and county of New York, for the escape of a judgment debtor, imprisoned under an execution upon a judgment in favor of the plaintiff. The complaint demanded judgment for \$1,304.84, the amount of the execution.

The defence was, the voluntary return of the debtor before the commencement of the action.

The cause was tried before the Chief Justice and a jury, in March, 1855.

It was proved on the part of the plaintiff, that early in the morning of the 25th of November, 1854, the debtor was seen out

of the city and county, and the limits of the prison, and that during this time the summons against the defendant was in the hands of a coroner. It was also proved, however, that the summons was not served on the defendant until eleven o'clock, A. M., of that day, and it was admitted, that before that hour the debtor had returned, and was then within the limits.

Upon this evidence the counsel for the defendant moved for the dismissal of the complaint. The Chief Justice granted the motion, and the counsel for the plaintiff excepted to his decision.

A motion for a new trial was made at Special Term, before Hoffman, J., who denied the motion, and delivered the following opinion:

HOFFMAN, J.—The judgment debtor Gans was on the limits, under an execution against him, on the evening of the 24th of November; and between seven and eight o'clock on the morning of the 25th of November, he was found at Hoboken. During that day a summons was put into the hands of the coroner, with directions to serve it upon the sheriff. It was served at ten minutes before eleven in the forenoon of that day. It is conceded as part of the case, that the debtor had returned to the limits before the service of the summons on the sheriff, although after the delivery to the coroner.

The defence of the sheriff is under the 82d section of the Revised Statutes, (vol. 2, p. 348 3 ed.,) that he may plead, before the commencement of the action, that the prisoner had voluntarily returned to the jail from which he had escaped, or had been retaken.

It is not denied, that before the Revised Statutes, the delivery of a writ to the coroner would have been the commencement of a suit, to fix the sheriff for an escape. A clear intent to put the writ in motion to be delivered would have been sufficient; *Ross v. Souber*, (4 Cow. 161,) and the cases cited settled this.

It is, however, equally clear, that under the Revised Statutes, (2 R. S. 347, § 1,) a suit was not commenced so as to charge the sheriff, until service of the *capias* upon him, where the suit was thus instituted. (*Carruth v. Church*, 6 Barb. Sup. Ct. Rep. 504, and cases.)

By the provisions of the Revised Statutes, (2 R. S. 299, § 88,) among those regulating the limitations of actions, it was enacted,

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that no action should be deemed to have been commenced, within the meaning of the chapter, unless it appeared, "that the first process or proceedings, was duly served upon the defendant, or that a *capias* was issued within the time required by law to the sheriff of the county in which the defendant usually resided, or last resided, in good faith, and with intent actually to be served, and that such writ was duly returned."

It is obvious that this last clause formed an exception to the general rule prescribed by the statute, and was only in relation to the statute of limitation.

The 99th section of the Code is framed upon the same principle as this provision of the statute, and in language quite similar.

It is part of the title of "The time of commencing actions."

The 127th and 134th sections prescribe the manner of commencing such actions, and with certain exceptions require a personal service of the summons. The Code appears thus to coincide with the Revised Statutes.

The case of *Lee v. Averil*, in this court, (1 Sand. S. Court Rep. 731,) goes far to recognize that this is the true construction of the Code.

The motion to set aside the nonsuit must be denied, with ten dollars cost.

J. M. Robertson, for the plaintiff, appellant, now insisted that the judgment dismissing the complaint was erroneous, and that it ought to be reversed, and a new trial be ordered, upon the ground that the action was sufficiently commenced within the meaning of the Code, so as to bind the sheriff, by the delivery of the summons to the coroner with directions to serve it. He argued, that the provision in section 99 of the Code is general, and that its effect is, that in all cases where the summons is actually served, the service relates back to the issuing of the summons, and makes that the commencement of the action. He cited *Coles v. Kerr*, 2 Sand. 660; and *Gregory v. Weiner*, 1 Code Reporter, 210.

A. J. Vanderpoel, for the defendant, contended that section 99 of the Code only creates an exception from the general rule, that an action is not commenced until the service of the summons, and that "an attempt to commence an action" by the issuing of a sum-

mons is only to be deemed equivalent to its actual commencement, when necessary to avoid the meaning of the Statute of Limitations.

BY THE COURT.—The 127th section of the Code, by declaring that civil actions shall be commenced by the service of a summons necessarily implies, that until such service the action cannot be held to be commenced. Actual service is, therefore, undoubtedly the general rule, and the only exceptions from this rule are those created by sections 99 and 135; that created by section 99 is applicable only where the commencement of the action is necessary to be shown in order to exclude a defence founded on the Statute of Limitations. It is for the sole purpose of repelling such a defence, that the attempt to commence an action by the delivery of a summons, with the intent that it shall be served, is deemed equivalent to a commencement by actual service. As to the exceptions created by section 135, it is not pretended, that they have any application to the case before us. They substitute publication for personal service, and are confined to actions against non-resident or absconding debtors and foreign corporations. Although prior to the adoption of the Revised Statutes, an action was held to be commenced by the mere issuing of process, it is certain that the Revised Statutes changed the law by substituting the rule of actual service, and we are clearly of opinion that it is this rule that the provisions of the Code adopt and confirm.

The complaint was therefore properly dismissed, and the judgment appealed from must be affirmed, with costs.

JOHN W. SLEIGHT *v.* WILLIAM LEAVENWORTH and JOHN D. MCGREGOR.

A mortgagee of chattels, having seized them for satisfaction of his demand, the parties in possession claiming under the mortgager, executed an instrument by which they agreed to return and deliver the goods to him, on demand, or to pay the sum of \$671.38 claimed to be due. An assignee of the mortgagee recovered against the parties the sum of \$500, and costs, in a suit upon this instrument. After execution against the property unsatisfied, an execution against the persons of the defendants was issued, under which one of them, the present plaintiff, was arrested, and gave bail for the limits. At the end of about nine days, he was discharged, and his bond cancelled, on the ground that the judgment did not warrant the arrest.

Held, in an action of false imprisonment brought against the plaintiff in such former suit, and his attorney, that each was responsible to the plaintiff for damages.

(Before DUKE, CAMPBELL and HOFFMAN, J.J.)

December term, 1855.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, upon the ground of an erroneous refusal of the Judge to nonsuit the plaintiff when the testimony was closed, and for error in his charge.

One Augustus Hurd executed a mortgage to Henry S. Rosenkrantz, on the 17th of October, 1850, upon certain personal property, to secure payment of the sum of \$671.38, the amount of his promissory note given to Rosenkrantz.

This note, with the accompanying mortgage, was assigned to one James T. LECTE about the time of its date.

The mortgage was duly filed on the day of its date.

About the 21st of December, 1850, certain property came into the possession of J. Mills, and J. W. Sleight, (the present plaintiffs,) then partners in trade, under the name of Mills & Sleight, by a transfer of the mortgager, Hurd, to pay them a debt of five hundred dollars; and that sum appears to have been taken as the value of the goods.

In January, 1851, LECTE, through an agent, seized property in the possession of Mills & Sleight, alleging it to be the property mortgaged, or part of it.

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Mills & Sleight then executed the following instrument. It was given to prevent the removal of the goods.

"Whereas James T. Lecte, by his agent, B. D. Wisner, has seized on certain property mortgaged by Augustus Hurd to H. S. Rosenkrantz, and by said Rosenkrantz assigned to said Lecte, which property consists of (enumerating the articles)—and whereas said property is now in the possession of the undersigned. Now, therefore, we, the undersigned, agree to safely keep and deliver to the said Lecte, or to his said agent, the said property, on demand, as they now exist, or to pay the said mortgagee six hundred and sixty-one dollars and thirty-eight cents, and all proper costs, charges, and interests, which have or may accrue thereto. Add, also, two puncheons of rum, &c., upon the terms above expressed. Dated January 9, 1851."

Before the 31st of January, 1851, the note and mortgage of Hurd, with this agreement, were assigned by Lecte to William Leavenworth, one of the present defendants. And on that day he commenced an action upon the agreement against Sleight & Mills, in the Court of Common Pleas. The result of that action was a judgment in his favor, on the 15th of January, 1852, for the sum of five hundred dollars damages, and eighty-six dollars and fifty cents, for costs. The present defendant, McGregor, was the attorney of Leavenworth in that action.

Upon this judgment, an execution was first issued against the property of the defendants therein, and upon being returned unsatisfied, an execution against the persons was issued. Under this, the present plaintiff, J. W. Sleight, was arrested, and gave bonds for the jail limits. The arrest took place on the 21st of January, 1853, and the party was discharged by an order of a Judge of the Common Pleas, on the 1st of February of the same year. For this false imprisonment the present action is brought.

The Judge charged the jury, at the trial, that the arrest of the plaintiff upon an execution against his person, upon the judgment which had been proved, was wholly unauthorized, and that the defendants were both liable in the action.

An exception was duly taken; and upon this, and an exception to the refusal of the Judge to dismiss the complaint, the case came before the court.

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The jury found a verdict against both defendants for one hundred dollars damages.

J. D. McGregor, for appellants.

H. S. Lincoln, for respondent.

BY THE COURT. CAMPBELL, J.—It cannot be disputed that the action in the Common Pleas, and the recovery, were exclusively upon the instrument or bond executed by Mills & Sleight. The action was, therefore, upon a contract merely. The difference between the sum mentioned in the bond, and the recovery, viz., \$500, arose, no doubt, from the referee's finding the latter sum to be the value of the goods actually taken by Mills & Sleight. There is nothing apparent on the record, or otherwise, in the case, to show that the present plaintiff could have been arrested under the 179th section of the Code. (See § 288.) It was a plain case of false imprisonment.

The client is responsible for the acts of his attorney, affecting the rights of the parties to the record. Assuming that Leavenworth was wholly ignorant of the issuing of the execution, he is yet responsible for an arrest under an execution which was not warranted by any judgment. (*Taylor v. Trask*, 7 Cowen, 261.)

The liability of the attorney, who was the direct agent to authorize the arrest, is still more clear. (*Deyo v. Van Valkenburgh*, 5 Hill, 242.)

The judgment must be affirmed, with costs.

ROBERT J. CHESEBOROUGH v. GEORGE V. HOUSE and CAROLINE E., his wife.

Although a summons and complaint ask the recovery of a sum of money from the defendants generally, yet if the case made shows a demand binding merely the separate estate of a married woman, the cause is of an equitable nature, and should be tried at Special Term, without a jury.

The complaint alleged that the defendant, the wife, was to take the furniture, the subject of the suit, in her own name, and pay for it out of her own funds. The defendants, answering jointly and severally, averred that the wife was solely interested; that the money paid was paid out of her separate estate, and that she had separate estate to the amount of \$6,000. The written agreement, upon which the action chiefly rested, was signed by Smith and Caroline E. House, and the property was transferred to her, and she covenanted to pay the stipulated price in the manner therein stated.

Held, that her separate estate was bound, and judgment given for recovery of the demand out of it.

The case distinguished from that of *Switzer v. Valentine*, (4 Duer, 96.)

Form of a judgment in such a case.

(Before DUER, CAMPBELL and HOFFMAN, J.J.)

December term, 1855.

APPEAL from a judgment at Special Term, entered the 30th of December, 1854, as follows:

This cause having been brought to trial at a Special Term of this court, held at the city of New York, before the Hon. Murray Hoffman, one of the justices thereof, on the issue of fact joined therein, and after hearing R. Reed, and others, of counsel for the plaintiff, and Wm. W. Niles, of counsel for the defendants, and on due consideration by the court, it appearing, that on or about the first day of March, one thousand eight hundred and fifty-three, Caroline E. House, one of the defendants, then being a femme covert, to wit, the wife of the said George V. House, other of the said defendants, entered into an agreement or contract in writing with Joseph L. Smith, the assignor of the plaintiff in said cause, for the purchase from him of certain goods and chattels, then being in the house number 345 Broadway, in said city, and by which said agreement or contract, the said Caroline E. House, undertook and promised to pay to the said Joseph L. Smith for the said goods and chattels, the sum of three thousand and five hundred dollars,

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at the times and in the manner pointed out by said agreement, and that the said Caroline E. House was possessed of separate property and estate, which she held to her sole and separate use, free from the control of her said husband, and that the said contract was entered into by the said Caroline E. House for her benefit, and that she acquired thereby the said goods and chattels which was then and there, by the said contract, conveyed to her, by the said Joseph L. Smith, and became her sole property, and that such contract was intended to be, and is, by the law of this state, a charge upon the separate property and estate of the said Caroline E. House, and it appearing further that the sum of five hundred dollars, being a part of said sum of three thousand five hundred dollars, the purchase money aforesaid, with interest from the said first day of March, one thousand eight hundred and fifty-three, is due to the said plaintiff, as the assignee of the said Joseph L. Smith, and is unpaid, and that the said plaintiff is entitled to the payment of the said sum, together with his costs and disbursements in this cause, out of the separate property and estate of the said Caroline E. House, and that the said George V. House was, at the commencement of this suit, and still is, the husband of the said Caroline E., and by reason thereof, a proper party to this suit, it is ordered and adjudged, that this court, by virtue of the power and authority vested therein, doth order and adjudge, that the said sum of five hundred dollars, together with fifty-six dollars and sixty-six cents, the interest aforesaid, and one hundred and eighteen dollars and twenty-eight cents, the costs and disbursements of the plaintiff in said cause, which said sums amount, in all, to six hundred and seventy-four dollars and ninety-four cents, to be paid to the said plaintiff by the said Caroline E. House, out of her separate property and estate.

This case is made by the defendants to set aside said judgment, and for judgment for the defendants for their costs, or for a new trial, with leave to turn the same into a Bill of Exceptions.

The material allegations of the pleadings, and the facts found, are sufficiently stated in the opinion of the court.

W. W. Niles, for the appellants, and defendants.

N. S. Rowland, for the plaintiff, respondent.

BY THE COURT. HOFFMAN, J.—The principal question in the case is one of importance and some difficulty. It is whether such a judgment as has been entered can be rendered against Mrs. House, a married woman, upon these pleadings and testimony.

But other and minor questions, necessary to be passed upon, should first be determined.

1. The point whether the cause was not tried at Special Term without a jury, irregularly and contrary to the Code, depends upon the question whether the judgment can be sustained as it stands. It is a judgment against the separate estate of a married woman, to be satisfied out of that. It must rest upon her capacity to bind such separate estate—upon her having it—and upon her having actually and legally bound it. Such a case is manifestly an equitable cause of action; the judgment must be an equitable judgment. It was appropriate to the Equity Tribunal before the Code. Under the received construction of the 253d and 254th sections of the Code, it clearly would be a case triable by the court. (*Hill v. M'Carthy*, 3 Code Rep. 50.)

2. The next question relates to the rent which Smith agreed to pay by the contract with the defendants.

The facts are merely these:—Lent was the landlord of the premises, and Smith his lessee. Upon transferring the furniture, and as part of the stipulations between him and the defendants, he was to pay all the rent and interest thereon down to the 21st of March, 1853, the date of the agreement. Suits arising between Smith and Lent, the former, under orders in the suits, paid into court all the rent due down to that time, but without interest. Lent, the landlord, proves this, and that he received the moneys. He says the amount paid in was due to him. He has never, so far as known in the case, made a claim for any thing in the shape of interest. It seems clear that Lent never could sue, or in any way molest the defendants, or the property, for the rent falling due up to the 21st of March, 1853; and, hence, the spirit of Smith's engagement has been fulfilled.

3. In regard to the admission of the statements of the husband as to the amount due upon the mortgage, this is to be observed:—The opinion of the Judge at Special Term, and the finding show, from testimony, independently of the husband's testimony, that

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the sum of \$506.22 was due. This is not shown to rest solely on the husband's admissions.

4. The material, indeed the only question of difficulty in the cause, is that which relates to the liability of the separate estate of Mrs. House to this judgment. Could she bind it at all? Did this contract bind it?

The complaint states that both of the defendants were interested and concerned in the purchase of the said furniture, goods and chattels, and are now interested in the same. Yet as it was contemplated by the defendants to pay for such furniture, &c., usually out of funds belonging to said Caroline E. House, in her own right, it was agreed and arranged by the defendants, that the said Caroline should take and hold the title and ownership of the said goods, &c., in her own name, which was accordingly done; and the said Caroline, with the consent of her husband, and under his direction, executed a written agreement in her own name, with Smith, to purchase such furniture, and to make the payments therefor in effect as above specified.

The defendants answered jointly and severally, and deny that both of them were interested in, and concerned in the purchase of the furniture, &c., but that the said Caroline was alone concerned and interested in the purchase thereof, and now is solely interested in the purchase thereof, and that the money paid on account of the purchase thereof was paid out of her own separate and private funds. This was repeated in nearly the same terms in the amended answer. Again, it is stated in the answer, that the said Caroline was worth, in her own right, at least \$6,000.

The agreement on which the action chiefly rests, is between Smith and Caroline E. House. It is to this effect:—

That in consideration of \$3,500, to be paid to him, Smith, by Caroline E. House, party of the second part, he had bargained and sold to her all the furniture, &c., then on the premises 345 Broadway, and 92 Leonard street, to hold to her the said party of the second part. Mrs. House, the party of the second part, covenanted to pay in the manner stipulated, \$500 on delivery; \$658 to be paid to Beardsley to cancel a mortgage held by him; \$1,400 on or before the 15th of May ensuing; a piano-forte at \$325; and the balance on the payment by Smith of all rent due on such premises to the date, with interest.

This instrument was executed by Smith and Caroline E. House.

Certain payments are endorsed upon it, one of \$250, another of \$1,142, composed of the piano \$825, cash in court \$750, and sundries \$67. In the summer of 1853, Smith states Mrs. House admitted there was \$1,400 due on the purchase. Then, in September, 1853, an instrument is executed by Caroline E. House, with her husband, acknowledging that there remained due on the Beardealy mortgage \$693.38, and agreeing to pay it in the right of, and for the benefit of the said Caroline E. House. The plaintiff had obtained an assignment of this mortgage, and the above-stated covenant was therefore to pay the amount to him.

It has been contended that the case is governed by that of *Switzer v. Valentine*, (10 Howard, 109,) decided in this court. The differences are marked, and, in my opinion, decisive.

The action was by the husband claiming articles of furniture against a mortgagee, who had taken possession. The wife had given her note, and executed a chattel mortgage on the furniture, to secure the purchase money, and rent paid for, and meats and provisions furnished to her, while she was conducting a boarding-house. The articles seized under the mortgage by the defendant were in the husband's house. He had never consented to, nor authorized, the execution of the mortgage by the wife. He had never done any act to waive his right to treat the property as his own by the marital law. There was no evidence of any separate estate belonging to the wife, and no evidence of any engagement to pay for the property out of it.

The decision of the court in favor of the plaintiff was placed on the following positions.

The acts of 1848 and 1849 only capacitate a married woman to hold a separate property as her own, and to dispose of it as effectually as if she were unmarried. The capacity given to her to purchase is limited to purchases which she may make on the credit of her separate estate, or for which she may pay with such separate estate. A married woman, who has no separate estate, cannot make a contract now which would not have been valid before the statutes; and there was no evidence that Caroline Switzer ever had any separate estate. The husband was liable for its price, and it could be taken on execution against him.

In the present case, Mrs. House possesses separate property.

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The complaint avers that payment was to be made out of it. The answer absolutely denies a joint purchase. The proof is distinct by the instruments, to one of which the husband is a party, that she and her separate estate were alone to be bound. It may be doubted whether the husband is in any way liable.

It is then, I apprehend, the substitution of one piece of separate property, by an engagement to pay money, which was her separate property, in order to procure it.

Can the fact that she meant to go on and use the furniture, &c., in keeping a boarding-house, in other words, in trading, make a difference? I apprehend not.

In *The North American Coal Co. v. Dyett*, (7 Paige, 1,) a married woman had constituted an agent to carry on a manufactory of cotton, in which she was interested as her separate estate. His contracts were held to bind her property, for supplies furnished, and labor bestowed.

Her liability for even general personal engagements is, probably, settled by authorities; at any rate, a specific engagement to pay out of her separate estate is amply sufficient.

The present amounts, in substance, to such a case, (3 Mylne & Keene, 209.)

It cannot be that the husband, in this instance, could assert any right to this property.

The judgment must be affirmed, with costs.

ROBERT BARTOW and MARIA L., his wife, v. SIMEON DRAPER.

In a joint action by husband and wife for the recovery of land, no separate judgment can be given in favor of the wife and against the husband. They must recover jointly, or not at all.

Hence, there can be no recovery when it appears that the husband has debarred himself by his voluntary acts, from claiming the possession during his own life, when he is tenant by the courtesy, or when he is not, during the joint lives of himself and wife.

The plaintiff, in an action for the recovery of land, is bound to show, either a prior actual possession, or a paramount legal title.

In this case, all the Judges concurred in holding—

1 That the plaintiff could not sustain the action upon the ground that the strip or

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parcel of land demanded, and which was formerly part of a public street in the city of New York, had been allotted to them upon a partition between the heirs of G. Lorrillard, deceased.

2. That the action could not be maintained upon the ground that Mrs. Bartow, as a co-heir of G. L., was entitled to an undivided tenth of the parcel demanded, even upon the assumption that G. L. was the owner, since it appeared from the evidence that her husband had consented to the proceedings by which the defendant had acquired his title.

And lastly, that had all the heirs of G. L. united in the action, there could have been no recovery, since the evidence was wholly insufficient to show that either the title, or the possession, was ever vested in the ancestor.

Hoffman, J., was also of opinion that the title shown by the defendant, and which was derived from the corporation of the city, was valid and unimpeachable, upon the ground that the street, of which the parcel demanded in this action was formerly a part, and which had been regularly closed, was an *ancient public* street of the city, and that in relation to all such streets, it is a matter of fact, and of legal presumption, that the fee is vested, exclusively and absolutely, in the corporation.

Verdict set aside, and complaint dismissed with costs.

(Before DUEK, CAMPBELL and HOFFMAN, J.J.)

December term, 1855.

CASE upon a verdict rendered by the direction of the court in favor of the plaintiffs, for the recovery of the premises claimed, and \$1,000 damages for withholding the possession, and taken, subject to the opinion of the court at General Term, upon the questions of law arising upon the evidence.

All the material facts, and the questions raised and argued by the counsel, are fully stated in the opinion of the court.

December 9.—*D. Marvin*, for the plaintiffs, contended that they were entitled to judgment upon the verdict, with costs and with the mesne profits, at the rate of \$500 per annum, since the rendition of the verdict. The main proposition upon which he rested his argument was, that it is established law that a conveyance of land, bounded on a public highway, carries with it the fee to the centre of the road as part and parcel of the grant, and when the road is discontinued the land reverts to the owner, and that the rule is the same in cities as in other parts of the state. He cited numerous authorities, and among them, the following:—3 Kent's Com. 432; Woolwich on Ways, 5; 12 Wend. 371; 2 John. 357; 12 John. 252; 15 John. 447; 6 Com. 518; 5 Wend. 420; 9 Paige, 550; 1 Sand. S. C. Rep. 323; 4 Hill, 377; 1 E. D. Smith, 302.

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W. M. Everts, contra, insisted that the verdict ought to be set aside and the complaint be dismissed. Upon the main question, he argued that to make a good title to the soil of a highway, by virtue of a grant of abutting land, it is necessary, to carry up the deduction of title to a source, when the possession of, or title to, the soil of the highway is united with the possession of, or title to the abutting land; and that no such proof had been given, or attempted to be given. He also contended, that the rule of construction in regard to highways is not applicable to streets in this city, but that here the presumption is, that the fee, and not a mere easement of right of way, is in the public. Among other authorities, he cited, *Hoffman's Treat. on Rights of Corporations*, pp. 250, 291-4; 1 Wend. 262; 2 id. 492; 8 id. 85; 19 id. 128; 4 Com. 542; 4 Hill, 369; 2 Sand. S. C. Rep. 234; *Embury v. Conner*, 3 Comst. 511.

BY THE COURT. HOFFMAN, J.—There are four propositions under which all the material facts and questions of law arising in this case may be distributed. Upon three of these all the members of the court concur in the views I am about to state. Upon the fourth proposition, I express my own opinion merely.

First. That the present plaintiffs cannot sustain the action for recovery of the whole strip demanded, even supposing that George Lorrillard had any estate or interest in it.

Second. That the present plaintiffs cannot sustain the action for the proportion which they would be entitled to, in right of Mrs. Bartow as a co-heir of George Lorrillard. That proportion is one-tenth.

Third. That all the heirs of Lorrillard could not unitedly sustain such an action.

Fourth. That no one could sustain a similar action, because the proceedings to close Cross street were legal, and have vested a good title in the defendant.

First. The action is brought to recover a certain strip of land formerly part of Cross street, and described as follows:—All that parcel of ground situate in the 6th ward of the city of New York, heretofore a part or portion of the street called Cross street, and bounded and containing as follows: Beginning at a point on the northerly side of Chambers street, distant, north-westwardly, 30 feet from the corner of Centre and Chambers streets, and runs

thence north-easterly along the easterly line of Cross street, being also the line of land belonging to the estate of George Lorrillard, 37 feet 5 inches, to a corner of land belonging to the said estate of George Lorrillard, and land of George Bruce; thence north-westwardly, as the line between the lands of the estate of George Lorrillard and the land of George Bruce would run, if extended 20 feet 9 inches to the centre of Cross street, thence south-westerly 43 feet 2 inches, to the line or side of Chambers street aforesaid, and thence along the same, 20 feet to the place of beginning.

The description in the complaint is more condensed. This is taken from the deed of the Manhattan Company hereafter mentioned.

George Lorillard derived title on the 1st of June, 1808, by a conveyance from John Murphy, to a parcel of ground thus described: "All that certain lot, piece, or parcel of ground situate and fronting to Augustus street, in the sixth ward of the city of New York, bounded easterly in front on Augustus street, westerly, by a certain street called Cross street, northerly, by a lot of ground formerly in the possession of John Wade, and southerly, by a lot of land formerly in the possession of John Stricker, containing in breadth, in front and rear, each twenty-five feet, and in length, on each side, about one hundred and six feet, more or less; (all such part of the said lot, when Chambers street shall be opened and extended to Augustus street aforesaid, as will be necessary to form a (*continued*) parallel line with the northerly side of Chambers street, only excepted.) And also, all the right, title and interest of the said John Murphy, in, and to such part of the said lot of land, formerly in the possession of the said John Stricker, as shall on the opening and extending of Chambers street aforesaid, be and remain on the northerly side of the above (*continued*) parallel line."

Before November, 1832, George Lorrillard died. His will was contested, and finally set aside. His heirs-at-law succeeded to his estate. The final decision was in December, 1835. Some time prior to the death of Lorrillard, Augustus street was widened, and Chambers street extended eastwardly to Augustus street. And this last street was afterwards called City Hall Place.

The diagrams which I have drawn from the proofs and exhibits show the situation of the property at different periods from Lor-

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rillard's purchase to his death. No. 1, shows the lot at the time of the purchase. No. 2, exhibits it as affected by the extension of Chambers street, and the widening of Augustus street. In this the parcels are marked C C, which were taken for widening Augustus street; and the parcels A and B, are those made by the continuation of Chambers street. Parcel A, is the strip reserved in the deed from Murphy. Parcel B is that to which the right and title of Murphy is conveyed, referring to it as part of the lot formerly in possession of John Stricker. No. 3, shows the lot as it existed on the 8th of March, 1836.

In this position, and on the 8th of March, 1836, a bill was filed for a partition of the real estate of George Lorrillard among his heirs. A large estate was sought to be divided, and among the parcels set forth in the bill of complaint, was a lot of ground described as follows. "All those three tenements and lots of land lying on the northerly side of Chambers street, in the city of New York, and extending from Cross street to City Hall Place, being known and distinguished as Nos. 19, 21, and 23, Chambers street, and taken together, are bounded as follows, to wit: south-westerly, in front, by Chambers street; north-easterly, in the rear, by a lot of ground belonging to George Bruce; north-westerly, by Cross street; and south-easterly, by City Hall Place, formerly Augustus street, containing in front, on Chambers street eighty-nine feet eleven inches, (89 ft. 11 in.;) in the rear, upon ground of said Bruce, one hundred and one feet two inches, (101 ft. 2 in.;) upon the City Hall Place, nine feet two inches, (9 ft. 2 in.;) and upon Cross street, thirty-seven feet five inches, (37 ft. 5 in.) more or less.

Pending the suit in partition, and before the 6th of December, 1838, proceedings which had been taken by the Common Council for the opening of Centre street and closing of Cross street, were consummated. These proceedings had been commenced by the usual petition to the Supreme Court, in June, 1835. The commissioners' report and supplemental report were presented to that court for confirmation, in January, 1837, and were, by rule, duly confirmed on the 4th of that month.

The effect of these proceedings, upon the parcel of ground in question, was, to reduce the line on Chambers street from 89 feet 11 inches to 80 feet, and to make the front on Centre street 28 feet

4 inches. The closing of Cross street deprived the owners of a front upon it.

Diagram No. 4 shows how the lot then stood.

On the 6th of December, 1838, a Master in Chancery made his report in the partition suit, in which he stated the above changes made since the bill was filed; that the effect had been to take off the whole of No. 19 (street number) Chambers street, and most of No. 21. The residue of No. 21 had been added to No. 23, and formed one lot, as shown upon a diagram annexed to the report. The diagram is exactly No. 4; the words, in red ink, "now owned by the Manhattan Company," being found upon it.

On the 5th of February, 1839, an order confirming the commissioners' report was made, and on the 26th of June, 1839, the commissioners appointed to make partition reported, and their report was confirmed on the 10th of July.

It should here be observed, that on the 23d of January, 1838, the Corporation of New York, having first offered the strip of land in question to the heirs of Lorillard, sold and conveyed it to the Manhattan Company; received payment of the price, and in their conveyance, bounded and described the parcel precisely in the same manner as the strip demanded in this action is described.

It should also be noticed, that the Manhattan Company had, for many years previous been the owners of the land fronting on the west side of Cross street, from Chambers street to Reade street.

And then, as before observed, the commissioners in partition made their report, confirmed in February, 1839, and therein allotted to Robert Bartow and Maria L. Bartow, in right of said Maria, a parcel of ground thus described: "All that lot, &c., at the north-west corner of Chambers street and Centre street (being all that remains of the three parcels of ground described in the bill in this case as Numbers 19, 21, and 23, Chambers street) and is bounded south-westerly, in front, on Chambers street; north-easterly, in the rear, by a lot of ground belonging to George Bruce; north-westerly by ground belonging to the Manhattan Company, (formerly part of Cross street,) and south-easterly by Centre street; containing in front, on Chambers street, 30 feet; in the rear, upon ground of George Bruce, 33 feet 2 inches; on the north-westerly side, 37 feet 5 inches; and on Centre street, 23

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feet 4 inches, be the same more or less; being part of the parcel of ground granted and released to George Lorrillard by John Murphy, by deed dated June 1st, 1808, recorded in liber 80, p. 288."

It is admitted that no allotment made by the commissioners in partition to any of the heirs of Lorrillard, will include the strip in question, unless it passes by the allotment to the plaintiffs.

In our opinion it is perfectly clear that it did not pass to them, and that if the heirs collectively ever had or could claim a right to it, it remains a part of the undivided estate of their ancestor.

It is manifest that it was never carried into or estimated as a part of the estate to be apportioned. It was valued, in 1837, at over \$7,000.

Every term of the description in the allotment to the plaintiffs is fulfilled and met, by excluding this parcel. The corner of Centre and Chambers streets is taken as a definite point. The length on Chambers street is precisely fixed at thirty feet. The plaintiffs themselves prove that in January, 1838, the Manhattan Company took possession of the strip, claiming to have purchased the same of the Corporation of New York, and the diagram to the Master's report, designating the lot to be set off as part of the estate, speaks of this strip, "as now owned by the Manhattan Company." To give the parcel in question to these plaintiffs separately, under this allotment, would be to adopt a very forced construction of words, and when that construction would work injustice to others.

We are all clear in the conclusion that the plaintiffs cannot sustain this action for the whole of the parcel demanded.

Second. The present plaintiffs cannot sustain the action for the proportion, viz.: one-tenth which Mrs. Bartow would take as a co-heir of George Lorrillard, assuming that he was vested with any right in, or title to, the strip.

The decision of the Court of Appeals in *Embury v. Conner*, (8 Comstock R. 511,) determined, that the 179th section of the general act relating to the city of New York, (2 R. L. 1813, p. 416,) authorizing the taking of fractional portions of lots, which were not within the limits avowedly taken for public use, was unconstitutional, unless it was done with the owner's consent; that the act could be construed so as to provide for the taking with such

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consent; and then its provisions would be lawful. That consent could be proven like any other fact. The statute of frauds, as affecting real estate, without writing, did not apply, if a parol consent could be proven.

As to what amounts to such a consent, the court approved the decision in *Baker v. Brannan*, (6 Hill, 47.) There an action brought by a party for damages assessed upon laying out a private road under a statute, was held sufficient proof of assent. The statute was to be read, with the proviso that the owner should consent. The action was proof of it, and assumpsit would lie by him against the party assessed.

Again. Justice Jewett adverts to the statement in the report of the commissioners, that they had awarded a certain sum to the devisees of Daniel Ayman, in consequence of their relinquishing their interest in the parcel of ground taken, and says that the statements in the proceedings and report were admissible in evidence, to show that the parties to the suit were parties, by actual appearance, to the proceedings.

The court consider Embury bound, by his appearance and acts, and observe that if it was shown, that he was authorized to represent the others before the commissioners, it would show their consent also, especially when connected with the fact that they received the compensation awarded. The learned Judge then adverts to the fact of Margaret Jacot being a married woman, and expressly holds that her consent could have been given and proven in the same manner as that of adults. But there was not sufficient proof of her consent.

We, in the first place, consider the present case as if Mrs. Bartow had not bound herself, or could not bind herself, by what has taken place. But the action is by the husband and wife. The husband is entitled to the whole rents and profits of this property, if recovered, during their joint lives, if there are no children, and during his life, if there are. No separate judgment can be given in favor of his wife and against himself. They must recover jointly, or not at all. What defeats him defeats the action; and what amounts to a consent to, or ratification by him, of these proceedings, is fatal to the recovery.

As to him, the case is stronger than that of Embury & Conner. He united in the power of attorney to Mr. Dean, set forth in the

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case. The fifth article of that power, empowers Dean to do all necessary acts, for the preservation of the estate and the promotion of its interests, after confirmation of assessments, in cases of opening and widening streets. It is proved, that Dean acted as general agent of the heirs, and had the charge and supervision of the estate; that he appeared, as such agent, before the commissioners; that among the papers returned to the Supreme Court, was a communication, in writing, made by Dean as such agent, asking for the correction of the report, as to an award of damages on a lot in Centre street; which correction was made.

On the 16th of June, 1837, Dean, as agent of the heirs, applies to the Common Council, praying that such part of Cross street as adjoined their property may be conveyed to them, in fee, upon their paying their just proportion of the estimated value of that part of the said street, so to be closed.

On the 9th of September, 1857, he joins, as such agent, in a remonstrance against the employment of the strip in the closed street for a public school; and praying, that the corporation would sell the same to the adjoining owners, and on such terms as would be equitable.

On the 11th of December, 1837, Dean, as such agent, united with other owners of adjoining lots in remonstrating against the corporation putting an enhanced price upon the property; but praying that the ground should be awarded to such owners, at the commissioners' valuation, with the addition only of such percentage as would save the public from loss. The Common Council having decided against this application, and the estate of Lorrillard refusing to take the parcel at the proportion stated of the enhanced price, the sale and conveyance were made to the Manhattan Company.

On the 1st of July, 1837, the said Dean, as agent of the estate, received from the corporation the sum of \$19,488, the amount of the awards to the estate for damages, and paid them the sum of \$21,616.66, the assessments for benefits.

In October, 1837, he submits a statement to the heirs, of these facts. Both amounts go into his general account with other items, and he divides the balance among the heirs, according to their respective proportions, and accounted for and paid over the same to them.

To estimate the force of this statement and receipt, it must be

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remembered, that the closing of Cross street was united with the opening of Centre street, and made one proceeding. Hence, the award for damages includes all which the estate sustained, by each and all of the operations. "It must be assumed," in the language of the report of the Board of Assistants, "that all persons who were shut off from the old street, by the improvement, have been allowed the full amount of the damage they have received." Clearly, if there was a damage to the adjoining lot, by losing the side-front on Cross street, the commissioners did, or ought to have allowed it. Clearly, it could have been corrected, if they had erred in this particular, on the motion for confirmation.

Thus, then, the statement and receipt of the dividends amounts to this: that the agent had obtained, for damage in closing Cross street, (together with some sums for other damage,) a certain amount of money, and they accept it. Or, if nothing was allowed, he apprises the heirs of this fact, and pays them what was awarded on the other, but connected account.

It must be, here, also noticed, that, at the time, only the damages for the parcel actually taken for an improvement were specified in a report. An incidental damage, such as the loss of the side-front, would not appear, even if allowed for by the commissioners. The act of April, 1839, (ch. 209, § 8,) corrected this mode of making up a report. The commissioners may well have balanced the loss of a front on Cross and Augustus streets, by the far more valuable front on Centre street.

In our opinion, the consent of Robert Bartow, and his ratification of these proceedings, is placed beyond a doubt, upon the principles of the case in the Court of Appeals.

In relation to Mrs. Bartow, whether she was bound by the acts and evidence, which we consider as binding upon her husband, we express no opinion. It is unnecessary for the decision of the cause.

Third. The third proposition is, that all the heirs of George Lorrillard, could not, collectively, sustain such an action, to recover the premises.

This position, the defendant's counsel has strenuously urged, and upon reasoning substantially this—that, in order to dispossess a defendant, who, or whose grantors, have been in possession for fifteen years, a prior actual possession must be made out, or a clear

paramount title. The former, of course, cannot be claimed. It never, at any time, existed in George Lorrillard. If it had existed, the right ought to have been asserted in a reasonable time. (*Whitney v. Wright*, 15 Wendell, 171.)

What superior title could the heirs of Lorrillard show in themselves? Cross street, it is stated in the case, was an open and public street of the city as early as the year 1800. All that the record shows of the derivation of Lorrillard's title to the adjacent lot is the deed, from Murphy to them, of 1808. In that the boundary is, "Westerly by a certain street, now called Cross street," the length there being twenty-five feet. And then Murphy also grants all his right and title to the strip formerly in the possession of Striker, and which I have marked on diagram B. This triangular piece gives the twelve feet five inches on Cross street. And this, with the original twenty-five feet, is stated in the bill for partition as having belonged to, and been in the possession of Lorrillard.

We may concede, for the present, that the presumption acted upon in the cases of John street and Cherry street, (19 Wendell, 659,) of the occupant, and apparent owner, of an adjoining lot being the owner of the strip, is a valid presumption. But that will be proper, simply to determine to whom the money awarded for damage, or assessed for benefit, should be adjudged. It can settle no rights between the true owner, when discovered, and the occupant. The court would not enter into the adjudication of such contested claims.

But when an ejectment is brought by a claimant against a party in possession, something more is necessary than to show a mere right which amounts, at the best, to a presumptive right of possession. When no actual possession ever existed in the claimant, and none is shown in his grantor at the date of his grant, he must go back, and show that some one, under whom he claims, had, at one time, possession and title, or at least the latter, and that he has succeeded absolutely to all such right.

These views strike us as entitled to great weight. It might, however, be improper to determine upon them, absolutely, in the absence of other heirs of Mrs. Lorrillard.

Fourth. I proceed to the consideration of the fourth point stated, as to which I express my own opinion only. In my judgment,

neither the plaintiffs, nor the heirs of Lorrillard, nor any other person, can make out a better title to the strip in question than the defendant. That title is legal and valid. The proceedings of the corporation, and the deed to the Manhattan Company, were authorized and lawful.

I consider that in relation to the ancient public streets of the city of New York, it is either matter of fact, or matter of legal presumption, that the fee is in the corporation. By the term ancient, I mean all the streets not laid out under the act of 1807; and by the term public, those originally laid out by the city government, under an existing law, or where laid out by private owners, adopted and taken by the corporation as public streets.

And here it is to be noticed, that, without the act or adoption of the city government, there could not be a public street. In the language of Mr. Justice Platt, (19 Johnson Rep. 186,) "The original survey and map showed that Peter Stuyvesant formed a plan for laying out streets over his land in 1796. But we must intend that every person knew that those streets could not be established as public streets of the city, unless they were sanctioned by the corporation, or other public agents, having such powers."

This necessarily resulted from the grant in the charter of 1686, confirmed in that of 1730, of the right and absolute power to ordain and establish streets throughout the city. An absolute power like this was, necessarily, an exclusive power. Justice Platt is mistaken, if, indeed, his language is so to be understood, in supposing that the statute of 1807, superseded, as an act of legislative power, the control of the corporation. That act was passed upon the formal application and assent of the city government.

This act of 1807 was a compact with the legislature, by which the corporation of New York agreed to a circumscription of its own powers, and in establishing a great system of streets, to restrict itself from the exercise of the power of alteration. But beyond the limits of the act, every power remained as absolute as it was before.

In relation to Cross street, we find it upon the record, that in or prior to the year 1800, it was one of the known public streets of the city of New York. I do not suppose that a reference to the public maps is improper. Upon examining them, we find that in that of 1755 there is no trace of it, nor in that of Lieutenant Rutzell,

of 1767. In Hill's map, of 1782, we find a line drawn, apparently corresponding with the easterly line of this street, and houses marked upon it. But no line of a street is indicated on the westerly side. In the map of 1797, it is laid down with the marks of a street, and called Potter's Hill. It is defined from Chambers street up to Read on the westerly, and to Bailey street on the easterly side, the latter being a continuation of Read street, with some divergence. On the map of 1808, it is similarly laid down, but not named.

It is an inevitable conclusion, that Cross street, being a public street in 1800, had been taken and opened as such, in one of three modes. Either under the act of April, 1787, then in force, by a regular adversary judicial proceeding; or, under the same act, by mutual agreement as to the price, or compensation to be allowed; or by formal written cessions.

Under the statute, where the only question was as to the compensation, it was (as may naturally be inferred) the course to appoint arbitrators to adjust it. The cessions appeared to have been employed, where a transfer of the right was agreed to be made for certain collateral advantages, or stipulations, not the direct payment of a sum of money.

In either of these supposable cases, by which Cross street could have been opened, and made a public street prior to 1800, I apprehend the fee would pass. As it is not in evidence how it was in fact opened, we have only to act upon the statement of the record. But we have here the aid of a rule of law, that when the mode of opening a street cannot be traced, the legal presumption is, it was opened according to the law then in force. (2 John. Rep. 424; 2 Southard, 482.)

There are some propositions tending to interpret the act of 1784, which should in the first place be considered.

If the title to the land in this street was derived from a Dutch ground brief, it was originally subject to the right of the Government to take it without any compensation. And then the Colonial act of October, 1691, of which that of 1784 was a transcript, and the latter act, were restrictions of an unlimited power of government; and upon settled rules of law, the acts are to be construed strictly, as affecting pre-existing rights. What is not

plainly taken away from the corporation, by necessary inference remains in them.

I forbear to proceed further upon this topic. I have adverted to it, because, should it turn out, if this case goes again to trial, that the title to the land rests upon a Dutch ground brief, the point, to my mind, will be of no little moment.

Again, it is not to be contested that, for the purposes of the regulation of a city, it is highly expedient, if not essential, that a fee should reside in its government. (*City of Cincinnati v. White's Lessees*, 6 Peters, 133; *Board of Trustees v. Havens*, 11 Illinois, 534; *Hunter v. Middleton*, 13 Illinois, 50; *Doe v. Jones*, 11 Alabama, 63; Ch. Justice Jones in *Drake v. The Hudson River Railroad Co.*, 7 Barbour, 536; *Williams v. The New York Central R. R.*, 18 Barbour, 246; *Chapman v. The Albany and Sch. R. R.*, 10 Barbour, 363.)

In the next place, the rule applicable to country highways may well be placed upon the consideration, that the fee in the soil avowedly did not pass to the public. It was not estimated and paid for, but merely a right of use and enjoyment, and it was not paid for, because it was unnecessary for any of the public purposes that the fee should be taken.

As if pointedly to mark the distinction between public highways, and streets in the city, the Colonial Assembly, on the 6th of May, 1691, passed a general highway act, and on the 1st of October, 1691, passed the particular law applicable to streets in the city of New York.

This act of the 6th of May, provided for the laying out of such highways as should be agreed upon by a majority of the freeholders of the towns, subject to the approval of the Court of Sessions. (1 Smith and Livingston.) No provision was made for the compulsory laying out of a highway.

In June, 1703, another act was passed, which appears to have been a general act. It was continued on the 4th of August, 1705, and expired at the session after the 17th of June, 1709. The act of 1691, (May 6,) appears to have been revised. We find it in Van Schaack's edition of the laws, 1773.

By the act of 1703, commissioners were appointed for the several counties of the state. Under it the old post road was laid out,

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from the city of New York to the colony of Connecticut. There was no provision in it for compensation to owners.

There were some special acts during the colonial legislature of a very peculiar character. Thus, a statute was passed the 14th of October, 1732, for highways and roads in Suffolk county. The full value of the land, and damages by reason of making the road, were to be paid, and the persons desiring such road were to pay such value, damages and expenses. The road was then to be held for the only proper use of such persons as should pay for the said road, their heirs and assigns.

On the 29th of November, 1745, an act was passed relative to highways in Westchester county. In this, if the road was run through improved lands, compensation was to be made to the owner. If an agreement was not made, a mode for settling the amount by a jury, was prescribed.

On the 4th of May, 1784, the first act of the state was passed. It extended to Dutchess, Orange, Albany, Ulster, Washington, Westchester and Montgomery. Suffolk and Richmond were afterwards added. It had this new feature, that if the road was laid out, through improved or inclosed land, compensation was to be allowed for the value of the land, as well as damages to be fixed by two justices, or twelve men. No highway could be run through an orchard, or a garden, without consent.

This was revised, and a new act passed in April, 1801. (Sess. Laws, ch. 186.) This applied to all the counties except New York, Kings, Queens, Suffolk and Richmond. The 15th section directed that where the road was run through improved or inclosed lands, compensation was to be made through a jury for the damages sustained by the owners, by reason thereof.

In the revision of 1813, the provisions are similar as well as in the Revised Statutes of 1830. (1 R. S. 628, &c.)

There was a special statute passed April 2, 1801, (Sess. Laws, p. 111,) which deserves particular notice. It related to highways in the counties of Kings, Queens, Suffolk, and Richmond, and it provided that the commissioners should not lay out any road through any person's land without paying him the true value of the land so laid out into a highway or road, with such damages as he shall sustain thereby. This was the same provision as was inserted in several colonial statutes before noticed.

But in the act of 1830, this language was omitted, and the general clause employed, damages caused by the laying out of such highway. (1 R. S. 515, §§ 64, 65.)

From this review of the highway acts, it will appear, that, with the remarkable exception of the counties mentioned in particular statutes referred to, compensation was not allowed at all for public highways, until the act of 1784; and in that act only, when the land was improved; a provision changed in the statute of 1830. When land was not allowed for, or when only the damages were allowed, caused by the laying out, there could be no ground for supposing a transfer of the fee. It was not necessary. It was not paid for. It was not therefore actually, or impliedly, taken.

In the late case of *Gola v. Glass*, (19 Barb. Rep. 189,) it was held, in the fourth district, that the clause in the General Highway act, authorizing wild lands to be taken in effect without compensation, was unconstitutional under the constitution of 1821. The road was laid out in 1840. The provision referred to is:—"That private property shall not be taken for public use, without just compensation."

A similar decision was made in the seventh district, in the case of *Wallace v. Karlennowski*, (Barb. 118.) Justice Welles, in delivering the opinion of the court, adverts to the uniform character of such highway acts from the year 1784, and does not question their legality before the constitution of 1821. He observes also, that there can be no substantial distinction, because the right of way only was taken, and not the fee. The owner was deprived of his land, at least, for a time.

It can scarcely be doubted, that the received colonial law, recognized a right in the state, if not in the crown, to lay out public highways over lands without compensation. The statutes creating special exceptions, tend to prove this general law. From what source this rule was derived, is not so clear. The most sensible and consistent supposition appears to me to be, that it was the influence of the Dutch law, the same as the general civil law, by which the tenure of lands was such as rendered them liable to this public servitude. I have elsewhere endeavored to show from public documents, how extensively the Dutch ground briefs were regarded as sources of title, protected by the capitulation, and to which this public right attached. (Law of the Corpora-

tion, p. 265, 268,) all these statutes, then, were restrictions of the state, imposed by itself upon the exercise of its public right.

Nor is there any thing in the rules of the common law to shake this conclusion. The great highways of England were termed the king's highways, *altæ regie viæ*. They ran through lands belonging to the king, as the source of title or original owner, upon the doctrine of feudalism; or through lands granted by him. The highway was then run through such lands by an act of the king's power, or by the voluntary act of the owners. In either case, there was no compensation. And in either case, the king could not reclaim the land when the highway was discontinued.

When the act of 1691, and its copy, that of 1787, are examined by the light of these principles and this history, it seems to me a just conclusion, that the fee was to be paid for, and did pass. It enacts, that if, in laying out any street, the corporation take any person's ground, they are to give notice to the owner. To the intent that satisfaction may be given for all such ground as shall be taken and employed for the uses aforesaid, the mayor, &c., are empowered to treat and agree with the owners. If no agreement was made, they were to summon a jury before the court of the mayor, aldermen, &c., to inquire and assess such damage and recompense as should be due to the owners and others interested, for their several losses, according to their several and respective interests and estates in any such ground, or any part thereof, for their respective interests and estates in the same, as shall be adjudged fit to be converted for the purposes aforesaid. And upon the verdict of the jury, and payment to the owner and others having estates and interests, or tender of the amount, the judgment shall be binding upon, and against the parties, their heirs, executors, and assigns, and others claiming any estate or interest of, in, and to the said ground, and shall be a full authority to the said mayor, &c., to cause the said ground to be converted and used for the purposes aforesaid.

The value of the ground, according to the estate and interest of the parties therein, is to be estimated and allowed. Beyond all question, an estate in fee would be valued as such, and paid for. What would be the judgment under the act? That the ground be adjudged to the mayor, aldermen, &c., to be held by

them and their successors, for the use and purpose of a public street, upon payment or tender of the amount assessed.

When, then, in the act of 1813, that distinguished lawyer, Chief Justice Jones, who drew it, inserted the provision, "that upon confirmation of the report, the corporation should become seized in fee of the lands taken for opening the street; in trust, to keep the same open as a public street," he did no more than embody the traditionary and received doctrine of the colony and the state. He was the historian rather than the author of the law.

A few authorities may be here noticed.

In *The Board of Trustees v. Cavens*, (11 Illinois Rep. 554,) a statute provided that a proprietor of lands in a city about to lay them out in city lots, should make a plot in which the lots, streets, and alleys should be designated, "and the land intended to be for streets, or other public uses in any town or city, shall be held in the corporate name thereof, in trust, for the uses and purposes set forth and expressed or intended."

Under this act, the legal title to land in a street designated on such a plot was held to be in the corporation of a city, for the use of the public.

Hunter v. Middleton, (13 Illinois Rep. 50,) declared the same rule, and recognized the previous case. The court adverted, indeed, to the possibility that the fee might revert upon a discontinuance.

In *Doe v. Jones*, (11 Alabama Rep. 63,) it was held, that where there was a dedication for a public purpose, a grantee was unnecessary. The rule that a fee could not be in abeyance, was inapplicable where it was contemplated in the act of dedication that one would arise.

The necessity for a larger extent of power as to streets than as to highways, is dwelt upon. The rule of the court in *Barclay v. Howell*, (6 Peters, 499,) is applied, that if a corporation appropriate property given to it to a use different from that declared, it was ground for the interference of a Court of Chancery, not of a reverter to the former owner.

In *Barclay v. Howell*, (6 Peters, 499,) the court say, if this ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a Court of Chancery

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to compel a specific execution of the trust, by restraining the corporation, or by the removal of obstructions. But even in such a case the property dedicated would not revert to the original owner. The use would still remain in the public, limited only by the conditions imposed in the grant.

Hayward v. The Mayor, &c., of New York, (8 Barb. 486; 3 Selden, Court of Appeals, 314,) involves, to some extent, the same principle: the memorial of the corporation is indeed recited, in which they pray, not only that they may be empowered to take the lands for a market, but also to hold them for other public purposes in case of a discontinuance: and the preamble to the statute is, that the prayer appears reasonable. The statute also vested the fee in the corporation, in terms, upon payment of the amount assessed.

The case was of grounds taken under the act, for an almshouse establishment. The corporation paid the full value of the land, and many years afterwards removed the buildings, &c., and sold the property. The action was to recover the proceeds of the sale. Mr. Justice Edwards, in delivering the opinion of the court below, said:—"The title to the land in question became vested in the defendants, as a corporation of varied and extensive powers and duties. A corporation is bound to provide suitable accommodations for a class of inhabitants which will always exist in spite of the wisest regulations. If one location is given up, it must be merely for the purpose of obtaining another more convenient. And if the corporation has obtained property in a proper case in good faith, there can be no reason why a new location should not be paid for, by the sale of that which has been abandoned. The interest of the public requires it, and the party whose property has been taken shares in the benefit equally with others."

Again, the principle of the street cases should be examined. If it were not for the doubt cast upon the point by expressions on the opinions in two cases in this court, we should unhesitatingly conclude that the deed of Murphy did not pass the fee to the half of the street.

From the very beginning of this series of cases, viz.: the Mercer street case, (4 Cowen, 423,) to this time, there has been an unwavering course of decisions in the Supreme Court, and the Court of Errors, holding that a grantor, who bounds his grant upon a

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street in the city of New York, does not pass the fee to his grantee. And there is no distinction made between streets laid out under the statute of 1807, upon the commissioners' map, as it is termed, and the streets laid out by the corporation, or adopted by the corporation as public streets, and not within the limits of their great plan. The Mercer street case, (4 Cowen, 428;) The Sixteenth street case, (1 Wendell, 262;) Lewis street case, (2 Wendell, 272;) Attorney and Ridge street case, (8 Wendell, 85;) Thirty-second street case, (19 Wendell, 138;) Twenty-ninth street case, (1 Hill, 189;) Fifth street, (11 Wendell, 486;) Furman street, (17 Wendell, 601,) all concur to establish this result. I cite, to explain as well as to establish the rule, the language of Chancellor Walworth in *Livingston v. The Mayor, &c.*, (8 Wendell, 99.) "The principles of construction applicable to grants of property in the country do not apply to conveyances of city lots. The right of way is a mere rural servitude, confined to a convenient passage from the property granted to a public road." After stating the effect, in his opinion, of a grant of city lots bounding upon streets, he says, all that the grantor has a right to claim, is the value of the street to him, subject to the right of his grantee, to have them kept permanently open; in other words, the mere value of the legal title, subject to the easement of urban servitude.

These cases establish three points,—

First. That the owner of land in New York, making a grant in general terms, fronting a public street, did not pass the fee.

Second. That he must expressly grant to the middle of the street, in order to pass the fee to his grantee.

Third. That in either case, the fee was subject to an easement in the street. And here arose a most important distinction, applicable to three classes of cases.

If the grant was upon a street laid out upon the map of the commissioners of 1807, the fee remained in the grantor, until the street was opened. When opened, if he retained the property on one side, the value of the land, taken up to half the street, was given him, its actual value, as determined by the commissioners. If he had sold a fronting lot before the opening, bounding upon the street, he retained the fee; but it was of mere nominal value. The easement given by the boundary robbed it of any actual worth. The award of a dollar extinguished it. If he gave ex-

pressly up to the centre of the street, it was a point not fully settled, whether the grantee might not require payment for the actual value. But in any event, the corporation acquired upon the opening, the whole fee in trust for the public.

Next. That these principles were equally applicable to streets laid out by owners, and taken by the corporation for public use, in any mode in which they could legally take them.

Third. If so applicable in these cases, undoubtedly they were applicable when the corporation opened streets in parts of the city, not comprised within the limits of the map of 1807, under its general statutory power, and in pursuance of such power.

The cases in the Superior Court, to which I have adverted, are *Hammond v. McLaughlin*, (1 Sandf. R. Sup. C. 340,) and *Herring v. Fisher*, (ibid. 344.) In the latter, the Chief Justice expressly says: "We are not determining the construction of a conveyance of city lots, but of a country farm. The Herring farm, at the date of this conveyance was literally in the country, and Amity Lane was nothing more than a country road." The court treated it as a public highway. But I have elsewhere shown that it never was adopted as a public street by the city. (Powers, &c., of the Corporation, p. 287.)

The other case was of a strip in a street called Catharine street, laid out by Mr. Hammond, and never adopted by the Corporation, but closed by virtue of the act of 1813, ch. 70. The Court say, no street ever was, in fact, laid out there, and no street could be laid out there as the law then stood.

These decisions are strictly compatible with the doctrine of the Supreme Court in the street cases.

I proceed to consider the act of 1813, under which the proceedings in this case were taken, with the cases of John street and Cherry street. (19 Wendell Rep. 660, et seq.)

The theory of this statute, I apprehend to be this: The corporation were, in contemplation of law, seized of the fee in the streets, but seized, in trust, to keep the same as public streets for public purposes. The trust was not a condition, upon breach of which the property would be divested, and a forfeiture be worked. *Nicoll v. The New York and Erie R. R. Co.*, (2 Kernan, 131.) But legislative power and interference were necessary to extinguish the one public use, and apply the property, or its proceeds, to an-

other. The statute, therefore, provided a mode by which all the parties injured by the closing of the street, should have their damage and loss assessed; and it directed the corporation to pay such amount within four months, and then gave a right of action to the parties against the corporation, to recover the amount. In return for, and to provide means for meeting, this liability, the land was vested absolutely in the corporation, discharged of such trust, so that they could sell it in fee. The proceeds of the land were thus appropriated to a public purpose, viz.: to pay those to whom compensation was due for effecting that which public utility required, the closing of the street, or to other public uses.

With these observations, I proceed to examine the John street case, (19 Wendell R. 670.) I may first observe, that the decision was by Mr. Justice Cowen, at Special Term, and has not been judicially recognized since, in any case that I have ever met with. It has been practised upon, but in the manner hereafter noticed.

The improvement applied for in that case, was the closing a part of John street, on the southern corner of Broadway, which left a triangular piece to be taken; and also the taking a strip of land on the northerly side, straightening the street there, and altering the line elsewhere. The commissioners reported that the strip in question belonged to owners unknown, subject to a right of way, and they awarded to such owners one dollar for damages. They then assessed to the corporation, for the value of the strip to be taken to their use, \$15,000. On the application for confirmation, Mr. Justice Cowen declared two points to be applicable.

1st. That the owner of the adjoining land, Baltus Moore, was to be deemed the owner of the strip, and the one dollar should have been awarded to him.

Next. That the case fell within the constitutional provision of taking private property for public use without compensation. It was not to be treated as taken for public use.

But there is another most important fact connected with the John and Cherry street cases. The report was sent back for reconsideration and correction, by assigning and assessing the lands now awarded to the corporation, to the adjacent owners. (See 19 Wendell Rep. 678, and rule of the Supreme Court made thereupon.)

The commissioners in the John street case, made their revised

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report on the 24th of July, 1839, and reported, "That Baltus Moore was entitled to the strip, subject to a right of way in the public; and that they assessed the benefit and advantage to the said Baltus Moore, in consequence of his becoming entitled to the possession and use of such strip, discharged of the easement and public right of way, at \$15,000." This report was confirmed by the Supreme Court, September 9, 1839. The sum of \$15,000 was the precise sum at which the land had been valued and assessed to the corporation.

I called the attention of the counsel to this fact upon the argument, having been one of the commissioners; and I have since examined the record in the street commissioner's office.

The same was the course pursued, as I am informed, by the counsel of the corporation, in the Cherry street case.

The case, then, contains this judicial exposition of the statute. The mere nominal fee of the land in the street remained in the adjoining owner. It was valueless, subject to the easement. When such owner is to take or resume it, discharged of the easement, he must pay the actual value of the land, for the whole value consisted in the easement, which was to become extinguished. Thus in effect, he was to become the purchaser of the land; and having in fact, or by legal inference, received full value when the street was taken, he must pay full value when the street is restored, or given to him. This would be equity, and the remarks of the court in Hayward's case (3 Selden, 826) become very pertinent.

The practice adopted by the corporation in these cases should be adverted to more fully to understand this subject. Sometimes it was to give the right to the adjoining owner to purchase the land at the price fixed by the commissioners.

In the present case there is a report of committees, and action of the corporation of a different character. In these it was assumed that the corporation had a right to sell to any one at an enhanced price. But the records of the Common Council show how much this point was contested. In one report of a committee, the right of the adjacent owner to a pre-emption was advocated, and at the commissioners' price.

It was also conceded, that the offer to such owner at the enhanced price should be made.

The act of 1818, thus construed, is strikingly similar to an act

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of 8d. Geo. cap. 126, (1822.) But the latter carries out the principles by express provisions. After the completion of a road under it, the old way, or so much of it as the commissioners deem to be useless, shall be discontinued as a public highway, (with certain exceptions,) and such old road shall be vested in the trustees, to be sold and conveyed by them for the best price. But they were to dispose of such old road to the persons whose land adjoined it, or if he should refuse to purchase, to some other person; and they might exchange with such person any part of the old road, for any land taken for the purposes of the act. The money upon a sale was to be applied to the purchase of the new road.

The result of the actual decision in the John street case was, that Baltus Moore, instead of having property taken from him, acquired property upon paying its full value. A barren, naked fee, worth nothing, was, by the letter of the proceedings, taken away; and an actual, absolute, and beneficial estate and possession was transferred to him. It seems a difficult problem to solve, how such an operation can be regarded as depriving a person of his property. If such a right of reversion was property, he ought not to have been bound to pay any thing; if not property, the act was not unconstitutional.

In applying the rule of this case to the present, we find that the commissioners valued the whole strip in Cross street, from Chambers to Reed, at \$30,000. The valuation at which the corporation sold was \$38,500, and the apportionment of that amount for the strip in question, was \$7,526.50.

The proportion of \$30,000 upon this basis would be about \$5,767. Had the report been made upon the rule thus laid down, Lorrillard's estate must have paid this sum. It does not seem possible to present a view of the case in which there could be any claim whatever, except a money demand for difference; a demand subject, of course, to many difficulties at this late day.

But, in my opinion, the case rests upon stronger grounds, and I state the summary of my views in the following propositions:—

1st. Cross street, like other ancient public streets of the city, is to be assumed, until the contrary is proven, to have been opened according to the law existing at the time, which the record fixes before 1800.

2d. It is to be assumed that, upon opening such street, a full

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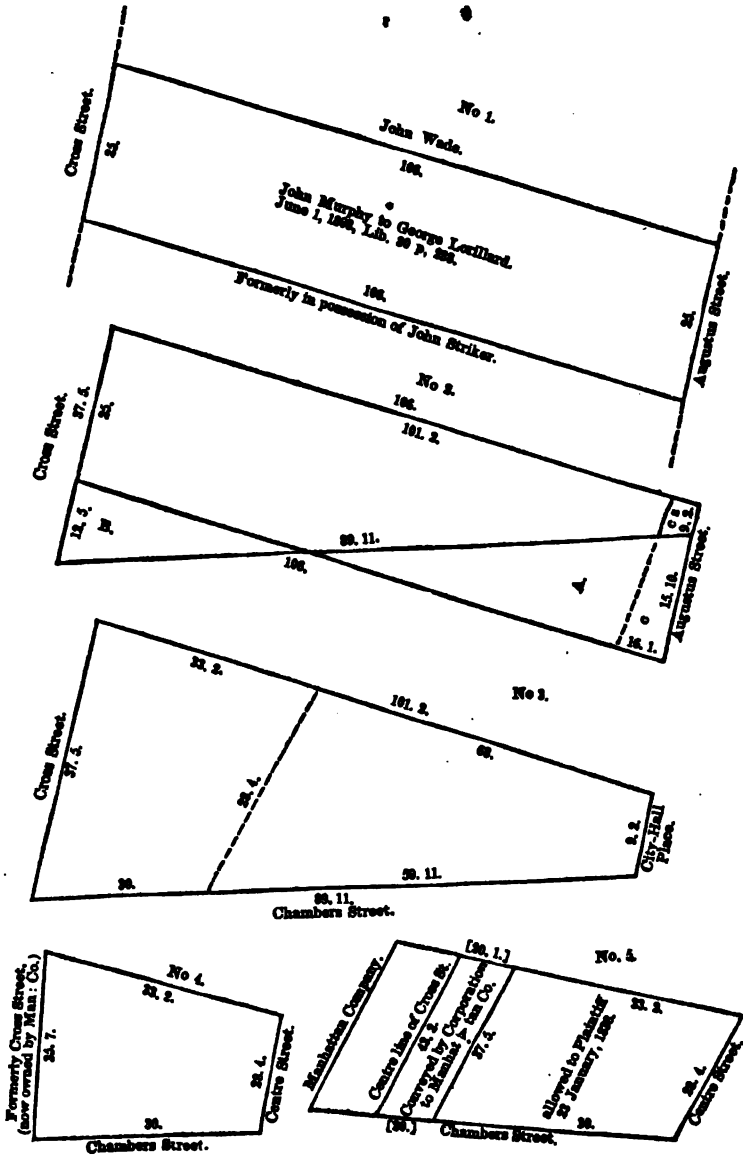
valuable consideration was given for the whole interest of the parties in the land.

3d. On that assumption a fee passed to the corporation, but clothed with a trust to keep the same open as a public street for the public benefit.

4th. The act of 1818, was constitutional, because it merely gave the assent of the legislature that, upon paying all who were injured, this trust should be extinguished, when the public benefit required it; and the property might be held and disposed of for public uses, or applied to the satisfaction of those to whom damages were awarded.

5th. The form of the report in this, and the John street case, of awarding the sum of one dollar to unknown owners as proprietors of the nominal fee, was irregular, but immaterial. It would have been sufficient and legal to have reported that the corporation was assessed the particular sum of money, by reason of their taking the land in fee simple absolute, discharged of the easement.

On this, as well as on the other grounds which have been stated, the complaint must be dismissed, with costs.



THEODORE DES ARTS and GEORGE L. HEUSER v. THOMAS B. LEGGETT, GEORGE F. LEGGETT, and JOHN A. LEGGETT.

The plaintiff agreed, upon the sale of goods to one, to take the note of a third person in payment. The goods were delivered upon tender, he refused to take the note, having heard some rumors, in the interval, to the discredit of the maker. The plaintiff (the seller) remained, for several months afterwards, without demanding it.

Held, that the purchaser had a right to dispose of the note, for his own purposes, as he thought proper. But that he had also the right to retain the note, and upon being sued for the price, to make a proffer of it; when the question as to whether the seller was bound to take it would be disposed of.

Held, that under the circumstances of the case, the purchaser had not exercised a disposing power over the note, by an assignment which he had made; but was to be treated as still retaining the control of it, to answer for the price of the goods to the seller.

Held, that the defendants, the makers of the note, were responsible to the plaintiffs for the amount. That the latter had an interest which entitled them to sue.

In case of a note not in fact negotiable, when the claim is made by the original party to whom it is given, the destruction of the note is matter of fact for the jury to determine; and, if established, no indemnity is requisite. Perhaps, in a doubtful case, the analogous rule of a Court of Chancery may justify the court in demanding it.

The Revised Statute, (2 R. S. p. 406, §§ 75-76,) is limited to negotiable paper, and to a lost bill or note. The party has a right to require indemnity before payment, but may waive it and obtain it at the trial.

(Before DUEK, CAMPBELL and HOFFMAN, J.J.)

December 11, 31, 1855.

THE case came before the court upon a verdict found for the plaintiffs, by direction of the court, for the amount of the promissory note in question, and interest, subject to the opinion of the court at General Term, upon a case to be made, with liberty to either party to turn the same into a bill of exceptions, or special verdict.

The case is stated in the opinion of the court.

M. Porter, for the plaintiff.

D. D. Field, for the defendant.

Des Arts v. Leggett.

BY THE COURT. HOFFMAN, J.—The facts of the case upon which the rights of the parties, in my opinion, depend, are these.

The plaintiff's action is upon a promissory note made by the defendants, Leggett & Brothers, for the sum of \$948.18, to their own order, and endorsed by James H. Benedict & Co., who transferred the same to the plaintiffs. They aver, in the complaint, that, while such note was owned by them, it was accidentally destroyed by fire.

The firm of James H. Benedict & Co. agreed with the plaintiffs, on the 29th of October, 1853, to purchase of them a quantity of rags, at a certain price. The purchasers offered to give in payment, their own note at six months, or the note of Leggett & Brothers (the defendants) at six months, without recourse. After some inquiry, the plaintiffs accepted the last offer, and wrote the following note to Benedict & Co.:

“NEW YORK, October 29th, 1853.

“GENTS:—We accept your offer of the ninety-five bales of rags, viz., three and three-fourths, six months, Leggett & Bros.' paper. Please let the bearer know whether we shall turn them out.”

On the same day the plaintiffs made out a bill as follows:

“NEW YORK, October 29th, 1853.

“Messrs. J. H. Benedict & Co., bought of Des Arts & Heuser, ninety-five bales of rags, (marks given and price,) \$945.18, against six months' note Leggett & Brothers.”

The goods were delivered on the same day.

The day of this transaction was Saturday. At that time, Benedict & Co. had in their hands a large amount of the notes of Leggett & Brothers. After the bargain, Benedict & Co. surrendered one of such notes, and replaced it with the one in question, to make the amount correspond with the price of the rags.

This was on Monday or Tuesday—most probably it was Tuesday, the 1st day of November. On Wednesday, the 2d of November, Benedict & Co. tendered the note to the plaintiffs. They refused to receive it. On Monday, they had heard rumors of Leggett & Brothers being in difficulty. On Tuesday night, Benedict &

Co. heard similar reports. Benedict, the witness, admits, that when the note was tendered, there were rumors against the defendants. On Thursday, the 3d of November, they stopped payment.

The note in question was dated the 29th October, 1853, at six months, for \$948.18. It fell due the 2d May, 1854.

It was put in a desk in the store of Benedict & Co., on the evening of the 4th of March, 1854, and the store was burnt on the morning of the 5th of that month. The witness, Benedict, states, that the note and the original bill were burnt with it.

Matters thus remained until five or six months after the fire, that is, until August or September, 1854, when, for the first time after the transaction, the plaintiffs made any communication upon the subject. Mr. Heuser, one of them, then asked about the note, and said they must have their pay from somebody; that they should proceed to get their money from some one.

On the 4th of March, 1854, Benedict & Co. executed an assignment to one William H. Leggett, not a member of the firm, of a large number of promissory notes, amounting to over \$16,000, upon a consideration paid by him. And on the same day, they entered into a special arrangement as to the note in question, in common with two other notes. In this they recite that there was a suit pending in the Superior Court, in which they were plaintiffs, and Cyrus W. Field and others were defendants, and that they had also had business transactions with Des Arts & Heuser, out of which they were apprehensive that litigation might arise between them, and that the said three notes might be necessary for the purposes of the said action, and of the said apprehended litigation. Therefore it was stipulated that nothing in the instrument should be construed to operate as an absolute assignment of their interest in such three notes, or to prevent any appropriation of the same as they saw fit. If it was necessary to make such appropriation, the consideration received therefor, from William H. Leggett, should be returned to him. A schedule annexed specifies the note now in suit. The consideration paid was thirty cents on the dollar.

Benedict, the witness, and member of the firm, states, that at the time, he told William H. Leggett all about the note—the sale of the plaintiffs, &c.,—that the note did not belong to their firm; that it was the property of the plaintiffs; that they could not sell

the note for thirty cents, as they would thereby assume seventy cents. The note never was given up, or passed to Leggett. It was retained by the counsel, and it appears that the counsel (it being Saturday night) left the notes with Benedict & Co., for safe keeping, on the 4th of March. The store was burnt, as before stated, on the 5th.

We consider that the questions, some of them of difficulty, which have been discussed, as to the right of property, and the responsibility for property after a tender and refusal, have very little bearing upon the case. It is needless for us to decide the delicate question, whether the plaintiffs were not justifiable, on Wednesday, in rejecting the note, and resorting to Benedict & Co. for payment of the price. We find here, an agreement to take the promissory note of a third party in payment of goods purchased. We find a positive refusal, upon tender, to take such note. We find, that for five months after the refusal, and three months after the maturity of the note, the seller never applies for it—in effect he persists in his rejection. The purchaser, in our opinion, had then an undoubted right to dispose of the note as he chose. After the refusal, it was at his option, to hold it as bailee, and whenever payment was demanded, to insist upon giving it up as satisfaction; or to appropriate it to his own purposes, and leave the seller to any remedy for the price he might possess. Especially in relation to commercial paper, we conceive that it is prescribed by mercantile facilities, and the needs of business, as a true principle of justice, that such a right should exist. To prohibit the holder of mercantile paper from using it in any form, because it has been rejected by one to whom he had undertaken to transfer it, would be to chain up a species of circulation until the caprice or interest of another shall release it.

Whether, then, the refusal of the plaintiffs in this case, to take the note of Leggett & Co. was warranted or unwarranted, is immaterial. They did refuse it. For five months they never recalled the refusal. Benedict & Co. had a plain right to part with the note. They could elect to leave the plaintiffs to any action against themselves for the price, dealing with the note as they chose, or to retain the note, to be proffered when an action was brought against them.

Thus, the question in the cause is really reduced to this.—Have

Benedict & Co. parted with the note, that is, in such a way as to give a right to it to another, so as to show that the plaintiffs are not the owners, or to show that they are not the absolute owners?

The question depends upon the agreement and instrument of the 4th of March, coupled with the competent parol testimony as to facts connected with it. It is of much importance to notice, that down to the 4th of March, Benedict & Co. had not exercised the right of treating the note as their own property. On the contrary, Benedict swears that they considered it as belonging to the plaintiffs. Had they passed it away—had they ever made a general assignment of their property—it would have been rightly transferred. But they clearly assumed to hold it down to that time on behalf of the plaintiffs. We thus arrive at the true construction and effect of the instrument of the 4th of March, 1854.

It cannot be disputed that Benedict & Co. retained, under this agreement, the right to the possession of the note, and to extinguish all the claim of William H. Leggett upon it, on repaying the thirty cents advanced. Leggett had but a lien upon it for such repayment by Benedict & Co. The sensible construction of the agreement appears to us to be, that Benedict & Co. reserved the right of saying, We will appropriate this note in payment of the rags, to the plaintiffs, if they claim it. Then we will repay you the advance. The plaintiffs do claim it by the present action. One of the firm sustains the claim. In his own language, the note is used by them on behalf of the plaintiffs. The firm consent to the present action.

The result is, that the plaintiffs have a right to recover in full, and William H. Leggett is left to reclaim the amount of his advance.

In relation to the question of indemnity, as for a lost note, we are of opinion that it is to be governed by the Revised Statutes entirely. The case of *Smith v. Rockwell*, (2 Hill, 482,) applies to the simple case of a maker of a note not in fact negotiable, and actually destroyed. A distinction is to be found, and is a very proper one, between notes negotiable and others. Before the Revised Statutes, it was held, that where a note was lost or destroyed, and the fact did not appear whether it was negotiable or not, the court would not presume it to have been negotiable; but if it appeared to have been negotiable, the plaintiffs could not have re-

covered in a court of law. (10 John. Rep. 104; 3 Wendell Rep. 344; 3 Cowen Rep. 303.)

The Revised Statute, (2 R. S. 406, §§ 75, 76,) is limited to negotiable paper, and the indemnity can be given upon recovery of judgment, (12 Wendell Rep. 174.) It is in terms also limited to a lost note or bill.

It would seem, however, that a proffer of indemnity, before commencing a suit, may be required. We understand the case of *Smith v. Rockwell*, (2 Hill Rep. 482,) to admit of this distinction; that as it is the right of a maker or endorser to require indemnity before payment, he may impliedly waive it, and does so by omitting to demand it. And in such a case, the statute allows him to obtain it upon the trial.

We consider the rule to be settled, that in a case like the present, of a note not, in fact, negotiable, (as the endorsement here was, doubtless, without recourse,) and when the claim is made by the original parties to whom it was given, the destruction of the note is matter of fact, to go to the jury; and, if established, no indemnity is requisite. Yet, in a doubtful case, it may be that the analogy of the statute as to a lost note, and the rule in a Court of Chancery, may justify the court in requiring it.

Judgment will be for the plaintiffs, for the amount of the verdict, with interest and costs.

JOSEPH NAYLOR v. GEORGE G. GLASIER.

A permit was granted to the defendant by the deputy street commissioner, to place bricks on the carriage-way of a street, in front of a building he was erecting. This was dated the 21st of May, 1854. On the 27th of May, a notice to remove them was posted upon the pile, signed by the defendant, commissioner of streets and lamps.

Held, that under the ordinances of the corporation, the power to order such a removal of an obstruction was vested in the superintendent of streets, at that time another person.

Held, that no power is given by the ordinances to the deputy street commissioner to grant a permit, and that a delegation of power by the street commissioner must be proven by writing, or a custom sufficient to show his consent.

There seems a concurrent power exercised by the street commissioner and the

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superintendent of streets, to order a removal of obstructions, and, by inference a power to permit its continuance.

Quere, whether the provision of the ordinance of 1845, as to giving notice by putting it upon the thing to be removed, is not now in force.

(Before DURE, CAMPBELL and HOFFMAN, J.J.)

December 31, 1855.

APPEAL from a judgment upon a verdict in favor of the plaintiff, against the defendant, for \$221.12. A bill of exceptions was duly made.

The action was for the unlawful taking from the defendant's possession certain bricks, on or about the 7th of July, 1854; that such bricks belonged to the plaintiff, and were of the value of \$350, and that the defendant converted the same to his own use.

The defendant justified the taking as an officer of the corporation of the city of New York, and as acting under the sanction of certain ordinances, and the authority of an officer, to whom the power was given of directing the removal of any articles encumbering the side-walks or streets.

The other material facts are stated in the opinion of the court.

R. J. Dillon, for the appellant.

Parsons, for the respondent.

BY THE COURT. HOFFMAN, J.—Upon the appeal from the judgment in this case, two questions arise. First, whether the permit granted by the deputy street commissioner, to encumber the street by allowing the bricks to be placed upon the carriage-way, was a lawful permit. This question arises under the exception of the plaintiffs, to the charge of the Judge.

Next. Whether the notice to remove the bricks was sufficient; and whether the charge of the Judge was in this particular correct.

It is obvious, that if the permit was lawful, the removal was illegal. It must be so even if the defendant was ignorant of the permit.

On the 22d of May, 1854, a permit was granted by Charles Turner, deputy street commissioner, as follows:—"Permission is given to Joseph Naylor, to place material on the carriage-way of the street in front of the building to be erected S. W. corner of

Broadway and Chambers street, for three months, provided such materials do not occupy more than one-third of the carriage-way in width, to be not more than ten feet in height, and one hundred feet in length of such carriage-way; and also, that the gutter along the sidewalk be kept clear and unencumbered to the breadth of two feet, and that the street remain so encumbered during the pleasure of the street commissioner."

It is in evidence that the street commissioner is in the habit of giving such permits to builders to encumber streets during the progress of tearing down old buildings.

On the 27th of May, 1854, before twelve o'clock at noon, the notice to remove the bricks was posted upon the pile. It directed the removal on or before the 28th, at twelve o'clock, or the bricks would be taken to the public yard, to be disposed of, as the ordinances of the corporation direct, and was signed by the defendant, as commissioner of streets and lamps.

On the 29th of May, and between seven and eight o'clock in the evening, the bricks were delivered to the keeper of the corporation yard.

On the 7th of July, the plaintiff, for the first time, communicated with the defendant as to the removal of the bricks. The son of the plaintiff then went to the office to inquire where the bricks were; he was informed they were in the corporation yard. He asked for a bill, which was given him, dated Thursday. The charges are for cartage of 210 loads, and storage for forty days, \$504.

It is plain that the plaintiff knew where to apply for his bricks, and that the amount of the last item is attributable to his own neglect or speculation.

The defendant, in his answer, justifies his removal of the bricks, under the 318th and 325th sections of the ordinance organizing the department, passed May 30th, 1849. The defendant was, at the time, commissioner of streets and lamps, the chief officer in the department of streets and lamps. In this department is a bureau, denominated "The Bureau of Cleaning Streets," charged with the duty of cleaning the streets, and removing encumbrances therefrom, the chief officer of which is the superintendent of streets.

He then states, that the bricks were encumbering and obstruct-

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ing the streets, and that Erastus W. Glover, being at that time superintendent of streets, and chief officer of the bureau, did, in conformity with the ordinance aforesaid, order the bricks to be removed from the street, and on the failure of the owner to remove them, the said Glover did remove them to the public yard.

The charter of the 2d of April, 1849, provided, (§ 12,) that there should be an executive department, under the denomination of "The Street Department," which shall have cognizance of opening, regulating, and paving streets, building and repairing wharves and piers, digging and building wells, and the construction of public roads when done by assessment: the filling up of sunken lots, under the ordinances of the common council, from the city inspector's department. It shall also have cognizance of collecting the assessments connected with such expenditures. The chief officer shall be called the street commissioner. (Davies Laws, p. 206.)

The 11th section provided, that there shall be an executive department, to be denominated "The Department of Streets and Lamps," which shall have cognizance of procuring the necessary supplies for, and of lighting the public streets and places lighted at the expense of the corporation, and of cleaning the public streets, and of collecting the revenue arising from the sale of manure, and also of transferring the butchers' stalls in the public markets, the commissioner of streets and lamps. "There shall be three bureaus in this department, and the chief officers thereof shall be called the superintendent of lamps and gas, superintendent of streets, and superintendent of markets."

By the 19th section, it is declared lawful for the common council to establish such other departments and bureaus as they may deem the public interest may require, and to assign to them and those herein created, such duties as they may direct, not inconsistent with this act.

It would be very difficult to say to which department, under the charter, the power of removing obstructions on streets had been conferred. If upon the street department, it is solely by force of the word, "regulating," in the 12th section.

In the history of laws and ordinances respecting the streets of New York, I apprehend the received meaning of the word "regulating," was the patching, grading, levelling, raising, or amending

the streets. These are the phrases used in the act of 1813, (section 175,) copied from former statutes.

If the department of streets and lamps claims the right, it is only by force of the power of supervising the cleaning of the public streets. This is, perhaps, a still slighter foundation.

I have not a doubt that an ordinance of the corporation, giving the power of removal, or of permission to obstruct, to either of these departments, or to any other department, would be perfectly valid.

The ordinances of May 30th, 1849, were adopted to carry out the new organization of the city government.

Title 4 is entitled, "of the street department," in the first article, and repeats, *verbatim*, the powers given in the 12th section of the charter.

The second article is entitled, "of the street commissioner, his deputy, and clerks."

By the 163d section, power is given to the street commissioner to direct the removal of any article or thing whatsoever, which may encumber or obstruct a street, wharf, or pier, in the city.

The second chapter of this article regulates the office of deputy street commissioner. No authority is given to him to direct the removal. The only section which bears upon the point, is the 184th, directing that he may perform such duties as shall be assigned to him by the street commissioner. This means, that he may be authorized to perform a power vested in the commissioner; but there must be a regular written delegation, or such a custom known to the commissioner, as is equivalent to it.

The 286th section, under title 4, of the department of streets and lamps, repeats the language of the 14th section of the charter, but adds, after the words, "cleaning the public streets," &c., the clause, "and removing encumbrances therefrom."

By the 311th section, under the head of "the bureaus of cleaning streets," the chief officer is called the superintendent of streets, who is charged with the duty of cleaning the public streets, and of removing encumbrances therefrom.

The 318th section is as follows:—"The superintendent of streets is hereby authorized, and it is made his duty, to order any article, or thing whatever, which may encumber or obstruct a street, wharf, or pier, to be removed, and if it be not removed

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within twenty-four hours thereafter, to order it to be removed to the yard occupied by the superintendent of repairs, or other suitable place."

By the 316th section, he is to report to the commissioner of streets and lamps all violations of any contract for cleaning the streets, and any omission or neglect of any person whose duty it is to inspect the streets or roads, or to prevent any encumbrance thereof.

The 321st section allows a redemption of the articles by the owner, upon payment of the necessary expenses of the removal, together with six cents per day, for every cart-load thereof, during the time it remains unclaimed.

The 325th section provides, that the superintendent of streets shall, in all matters connected with his bureau, be under the control, direction and supervision of the commissioner of streets and lamps, who may approve or disapprove all accounts certified by him, &c.

It appears to us very clear, that the commissioner of streets and lamps has no power to order a removal. It must come from the superintendent of streets. It is an authority which the common council had the power to give to the officer, and they have given it, expressly, to the superintendent; and have not given it to the commissioner. The 325th section by no means bestows this authority on the latter.

It is also clear, that there is no express provision, authorizing any one to give a permit to obstruct; but it may be well concluded, that a power to order a removal involves this authority.

And then we have the anomalous and inconvenient rule existing, of a concurrent power in the street commissioner, under the 163d section, and of the superintendent of streets, under the 318th section, to order a removal; and a power in each, by inference, to allow the obstruction to remain.

The result appears to me clear. The permit given by the deputy street commissioner was invalid. The notice to remove the bricks, by the commissioner of streets and lamps, the defendant, does not appear to have been authorized by the superintendent of streets, and was void. It is to be noticed, that the answer places the defence upon an order, made by E. W. Glover, then being superintendent of streets; and that he did remove the same. But there

is not any evidence, whatever, to prove an authority derived from him.

We consider that the views now taken are sufficient to dispose of the case, without passing upon the question of the sufficiency of the notice, by posting it upon the pile of bricks. That question, is one upon which some of the court entertain great doubts. It may be observed, that in the ordinances of 1854, (chap. 24, title 2,) the second section gave the street commissioner power to order the removal of any obstruction or encumbrance; and the third section directed the mode of service of the order, either personally, or by leaving it at the house or place of business of the owner, occupant, or person having charge of the house or lot, in front of which the encumbrance may be, or by posting the said notice, or order, upon such encumbrance or obstruction. (Page 288.) A similar provision is found in the ordinances of 1839, (p. 193;) of 1833, (p. 57, sections 23 and 24.)

In 1817, (p. 22, § 15,) the ordinance directed a personal service on the owner, occupant, or person in charge of the above house or lot, in front of which the obstruction or encumbrance might be.

It is to be noticed, that the general repealing clause, in the ordinance of 1849, (§ 509,) repeals all ordinances and resolutions inconsistent with that ordinance. No direction is contained, in any part of the ordinance of 1849, as to the mode of service; and it may be a point of no little consequence, whether the whole provision of that of 1845, as to such mode of giving service, is not now in full force.

It should also be observed, that, even if the fifth section of title 2, of the ordinance of 1845, recognizing the right of the street commissioner to give a permission to obstruct a street, is strictly in force, it seems to be superfluous, for the power to order the removal, implies a power to permit an encumbrance to remain. That power rests in both the street commissioner and superintendent of streets, as before observed. And it may deserve consideration, whether it should be allowed to continue concurrent.

The judgment recovered must, therefore, be affirmed, with costs.

THE GENERAL MUTUAL INSURANCE COMPANY v. ALFRED G.
BENSON.

Since the Code, there is no distinction, between suits at law and in equity, arising from the form of the pleadings, or the jurisdiction of the court.

When the sufficiency of a complaint is denied, as not stating facts constituting a cause of action, the only question is, whether the plaintiff, upon the facts stated, is entitled to the relief which he claims, and it is immaterial, whether that relief be legal or equitable.

If the relief be equitable in its nature, but cannot properly be granted without the presence of other parties, the objection of a defect of parties must be taken by demurrer, or answer; and, if not so taken, it must be held to be waived.

It cannot be taken upon the trial, in the form of an objection to the complaint, as not stating facts sufficient to constitute a cause of action.

As a general rule, when a fund is in the hands of a trustee, which he is bound to distribute to different persons in unequal proportion, all interested in the distribution are necessary parties to an action against the trustee.

But, when the sum that each is entitled to receive has been ascertained, by a proceeding binding on the trustee, each may maintain a separate action for his proportionate share, thus ascertained.

Judgment for plaintiffs affirmed, with costs.

(Before DUEK, CAMPBELL and HOFFMAN, J.J.)
December term, 1855.

APPEAL by defendant from a judgment entered, upon the report of a referee, in favor of the plaintiffs, for the sum of \$2,062.74, including interest and costs.

The cause was before the court upon a case containing the pleadings, report of the referee, and proceedings upon the trial.

The following are the pleadings and report. The proceedings it is deemed unnecessary to state.

City and county of New York, ss.:

The above named plaintiffs, by Alexander Hamilton, jun., their attorney, complain of the above-named defendant, and show to this court:

That the said plaintiffs made and executed a certain policy of insurance, whereby they became insurers of cargo on board of the ship Russell Glover, to the amount of ten thousand seven hundred and twenty-seven dollars and eighty-one cents.

That the said ship, together with the cargo on board thereof, was afterwards wrecked, and became a total loss, and the said plaintiffs have paid to the parties entitled thereto the whole amount which they agreed to pay by the terms of their said policy as aforesaid, to wit, the sum of eleven thousand eight hundred and twenty-seven dollars.

The said plaintiffs further show that the said defendant has, since the payment of the said loss, received a large sum of money from the sale of certain portions of the said cargo, which were saved, amounting in the whole, as these plaintiffs are informed and believe, to the sum of twelve thousand dollars, and upwards; that the said sum, received by him as aforesaid, belongs to the insurers of the said cargo, to whom the same was duly abandoned in proportionate parts, according to the sums respectively insured by them; and that the said plaintiffs are entitled to receive from the said defendant, for their share or proportionate part thereof, the sum of one thousand six hundred and one dollars and fifty-one cents, with interest thereon, and that the said defendant has been requested to pay the same, but has neglected and refused to pay the same, or any part thereof to the said plaintiffs; that annexed hereto is a copy of an average statement or adjustment of the said salvage, and which, the plaintiffs pray, may be taken as a part of this their complaint.

And these plaintiffs further show, that the said defendant received the said sum of twelve thousand dollars, before referred to, acting as agent or otherwise, in a fiduciary capacity, for the said insurers, and for these plaintiffs as one of them, entitled to their proportionate share of said sum of twelve thousand dollars, and unjustly and improperly refuses to pay over said proportionate share or sum, amounting to one thousand six hundred and one dollars and fifty-one cents, as above stated,

Wherefore, the plaintiffs demand judgment against the said defendant for the said sum of one thousand six hundred and one dollars and fifty-one cents, with interest from the first day of July, 1853, together with their costs, and a reasonable allowance for the expenses of this suit.

ALEX. HAMILTON, JUN., Plaintiffs' Attorney.

General Mutual Ins. Co. v. Benson.

SHIP RUSSELL GLOVER.

Total amount on board estimated to be \$80,382.22. Savings estimated \$12,000—14 $\frac{222}{1000}$ per cent.

Astor Mutual Insurance Co. . .	\$13,964 00	Reed.	\$2,084 64
Union " " " ..	1,400 00	"	209 01
Mercantile " " " ..	6,918 00	"	1,032 77
Atlantic " " " ..	12,200 73	"	1,821 41
St. Louis Perpetual " " " ..	3,455 17	"	515 81
Sun Mutual " " " ..	4,915 21	"	733 78
Delaware Mutual Safety " " " ..	200 00	"	29 86
Cincinnati Insurance " " " ..	249 58	"	37 26
New England Mutual Ins. " " " ..	3,079 53	"	459 73
General " " " " " ..	10,727 81	"	1,601 51
Uninsured, say	23,272 19	"	3,474 18
	<u>\$80,382 22</u>		<u>\$12,000 90</u>

WALTER R. JONES, JR.,	} Average Adjusters.
HENRY W. JOHNSON,	
A. F. HIGGINS,	

The defendant, answering, says, that he has no knowledge or information whereby to form a belief whether—

First. The plaintiffs became insurers of the cargo on board said Russell Glover to any amount: or—

Second. Whether they have paid to the parties entitled thereto, the whole or any amount which they agreed to pay, as alleged.

The defendant has received a sum of money, amounting to something about twelve thousand dollars, but the exact amount this defendant has not now the means of stating, which moneys he believes to have come from the sale of the wreck, or portions of the wreck and cargo of said ship; but this defendant has no knowledge or means of information as to who owns or is entitled to said moneys, nor any knowledge to whom he ought to pay it; or whether the plaintiffs are entitled to any portion thereof; nor can such knowledge be had by him, or by them, or by any person, until the customary average papers are fully made up, which has not been done; and this defendant, according to commercial usage, would be wrong and unsafe in paying any portion of said

money to any person till such papers are made up, which has not yet been done.

Nevertheless, this defendant is willing and desirous to pay such moneys to any person entitled to have and receive them, and respectfully submits the entire matter to this court, and will abide by their decision herein.

And, for the defence further herein, this defendant saith, that the plaintiffs in this cause are indebted to him in a sum of about five hundred dollars on contract, and for money had and received, which this defendant asks to have off-set, and pleads as a counter-claim to any sum which this court may find due to them out of the moneys in his hands.

Nevertheless, this defendant denies that he received said moneys in a fiduciary capacity, or in any way except in the regular course of his business as a commission merchant, they having come into his hands on the sale of consignments to him, and drafts sent to him, for all of which he accounted to his correspondent, and was directed, after paying over certain sums to certain persons, to retain the balance, subject to the result of the average adjustment in the matter of the Russell Glover, which he has done.

The defendant denies that the statement annexed to the complaint is an average adjustment or statement therein, and saith the same is only an estimate, and not a full or final statement; and this defendant asks to be discharged accordingly.

MARVIN & PRIME, Deft's Attys.

The plaintiffs replying to the answer of the defendant, herein deny that they are indebted to the said defendant as stated and alleged in said answers; and they also deny that the said defendant is entitled to any off-set or counter claim whatever against them, and they therefore demand judgment against the said defendant, as asked for in their complaint in this cause.

ALEXANDER HAMILTON, Jr., Plaintiffs' Atty.

To the Superior Court of the City of New York:

I, Philo T. Ruggles, of the city of New York, referee, to whom the above entitled action, and all the issues therein, were referred, to hear and determine the same, by an order of the court,

General Mutual Ins. Co. v. Benson.

made at a Special Term thereof, held at the City Hall, in the city of New York, on the 22d day of March, 1855 :

Do respectfully report, that I have been attended on said reference by Alexander Hamilton, jr., Esq., the attorney for the plaintiffs, and W. C. Prime, Esq., attorney for the defendant, and have heard and considered the proofs and allegations of the respective parties, and the arguments of counsel, and I find and report as matters of fact—

That the said plaintiffs, being then a corporation engaged in the business of marine insurance, and having an office in the city of New York, became insurers of cargo on board the ship *Russell Glover*, in the sum of eleven thousand eight hundred and twenty-seven dollars, and that said ship was afterwards wrecked and became a total loss, and that the plaintiffs paid to the parties insured by them, (upon receiving from them an abandonment of their interest,) as for a total loss upon the cargo so insured, the sum of eleven thousand eight hundred and twenty-seven dollars.

That certain portions of said cargo were saved and afterwards sold, and that the proceeds of sales thereof, amounting to the sum of twelve thousand nine hundred and sixty-three dollars and twenty-five cents, came into the hands of and were received by said defendant; and that in a fiduciary capacity, and as trustee for the parties entitled thereto, the said sum was received by him at various periods between the 16th of April, 1852, and the 17th of June, 1852, when the last instalment thereof was received by him.

I further find, that, after deducting and allowing from the said sum of twelve thousand nine hundred and sixty-three dollars and twenty-five cents, the sum of one thousand dollars for the compensation of the adjuster, and charges for collecting drafts, as well as a commission of two and one-half per cent. for receiving and paying, and all other charges thereon, there remains in his hands a net balance of eleven thousand six hundred and ten dollars nineteen cents, without charging interest to be divided and distributed among the underwriters, and others interested therein, including the plaintiffs in this action, according to their respective interests, and that a part of such sum so received by the defendant was identified by the marks and invoices so arising from sales of the particular goods and merchandises insured by said plaintiffs.

I further find, and report, that the share or proportion of the net proceeds of said cargo, after deducting charges and commissions above referred to, belonging to the plaintiffs, in the hand of defendant, amounts to the sum of fifteen hundred and forty-nine dollars and forty-eight cents, and that the final adjustment and distributions of said proceeds of sales (after allowing a reasonable time for completing said adjustment) could have been made on the first day of March, 1853.

I further find that the said defendant has settled with, and paid to various parties interested, the full amount to which they were entitled, under the *pro forma* adjustment annexed to the complaint herein.

From the facts so found and reported, I further find, decide and report, as matters of law, that the plaintiffs are entitled to judgment against the defendant for the sum of fifteen hundred and forty-nine dollars and forty-eight cents, together with interest thereon, from the first day of July, 1853, and costs.

All which is respectfully submitted.

Dated New York, July 17, 1855.

PHILO T. RUGGLES, Referee.

The defendant excepted to the report of the referee, upon the ground, that he had erred in not granting a motion, made upon the trial, that the complaint should be dismissed, as not stating facts sufficient to constitute a cause of action. And also upon the grounds, that the findings and decision of the referee were contrary to law and evidence.

W. C. Prime, for the defendant, appellant.

The complaint does not state facts sufficient to constitute a cause of action, and this objection was properly taken on the trial, and, indeed, may be taken in any stage of the cause, (2 Duer, 850; 3 Selden, 464.) The plaintiffs had no right to bring an action at law for their share of the fund; their proper and sole remedy was a suit in equity, for the distribution of the fund, in which all the parties interested should be joined. (1 John. 165; 2 Barb. 135, 145; 1 Stark. 572; 2 Chitty, 263.) The plaintiffs also failed to prove their complaint upon the trial. They did not show that their proportion of the fund had been ascertained by a proceeding

binding upon all the parties interested, and without such proof they were clearly not entitled to recover. (3 Ado. & Ellis, 99; 12 John. 296.) The defendant cannot safely account and pay over to any one of the *cestuis que trust*, without knowing the extent of his liability to each and all, and, hence, all the parties in interest should be parties to the action, it being certain, that those who are not parties, will not be bound by any judgment that can be rendered.

The judgment ought to be reversed, and the complaint be dismissed, or a new trial be granted.

A. Hamilton, Jun., for the plaintiffs, respondents.

The referee decided correctly in denying the motion to dismiss the complaint. This is not the case of parties interested in a trust fund, where the proportions are unequal, and the amount due to each not ascertained. Here, the amount has been ascertained by an adjustment made by proper and skilful persons, and the exact sum due to the plaintiffs is stated by the referee, and his finding of the facts is supported by the evidence. The defendant is, moreover, estopped, from setting up that the proportions due to the several parties are not ascertained, by his voluntary payment to two of the parties, more than two years since, of the exact amounts due to them under the adjustment, and by the allowance, to a third, even of a larger sum than that so ascertained to be due to him. Upon the whole case, it is manifest, that this defence has been interposed merely for delay, and to avoid the payment of a large sum certainly due to the plaintiffs, and which the defendant, without any reasonable excuse, has withheld from them for nearly four years.

I claim that the judgment which they have at last obtained should be affirmed, with costs.

BY THE COURT. DUER, J.—We can perceive no ground whatever for setting aside the report of the referee, as contrary to evidence. It appears to us, that all the facts found by him were, not only sufficiently, but very clearly, proved.

The only questions, then, to be considered, are questions of law, arising upon the pleadings, and upon the facts as found by the referee. The first of these questions is, whether the complaint

states facts sufficient to constitute a cause of action. The second, whether the decision of the referee, that the plaintiffs were entitled to recover, is a just conclusion of law from the facts which he has found.

The counsel for the defendant was right, in saying that an objection to a complaint, as not containing facts sufficient to constitute a cause of action, although not raised by a demurrer, may be taken upon the trial; but it is not necessary to say, that if not so taken, it may be raised upon an appeal from a judgment. Here, it appears from the case, that the objection was taken on the trial, but the counsel is mistaken in supposing that it ought to have been allowed by the referee, since we are clearly of opinion that it was not at all applicable to the complaint before him.

It may be true, that where a fund is in the hands of a trustee, with directions to pay it over to different persons in different proportions, all who are thus interested, in the distribution of the fund, are proper parties to an action against the trustee, but it by no means follows, that when an action against the trustee is brought by one of those persons, to compel the payment of the distributive share to which he claims to be entitled, the complaint is defective, as not stating facts constituting a cause of action, since it is manifest, that, in respect to the plaintiff, and the relief which he personally seeks, the cause of action is exactly the same, as if, by the terms of the complaint, all interested in the fund had been made parties, as plaintiffs or defendants. The true and only objection in such a case is, that all so interested ought to be brought in as parties, in other words, that there is a defect of parties, but it is certain, that this is an objection that can only be taken by demurrer or answer, and when not so taken is deemed to be waived, (Code, § 148.) Here, it cannot be pretended that the objection is taken in the answer, and hence, if it was meant to be raised before the referee he had no right to listen to it.

The argument for the defendant overlooks, entirely, the fact, that, since the Code, there is no longer any distinction between suits at law and in equity, as arising from the form of the pleadings, or the jurisdiction of the court; and hence, the cases to which we were referred, and which were all determined before the Code was enacted, have no application. When the sufficiency of a complaint, as not stating facts constituting a cause of action, is now denied,

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the only question is, whether, if the facts stated are admitted to be true, the plaintiff is entitled to the relief which he claims; and, in determining this question, it is quite immaterial, whether the relief sought is, in its nature, legal or equitable. Hence, if the present action, as involving the distribution of a fund by a trustee, is to be deemed equitable in its nature, but the presence of other parties was thought to be necessary, before the relief sought, although proper in itself, could with propriety be granted, the absence of those parties, ought to have been made a ground of objection, at the time and in the form prescribed by the Code, in order that the plaintiff might bring them in, if their presence were held to be necessary. As the objection has not been taken, in the only mode that the Code has sanctioned, we cannot do otherwise than hold, that it cannot now be urged. But we go further. Had the objection, that has been so strongly relied upon, been raised by a demurrer to the complaint, (the only form in which it could properly be raised,) we are clearly of opinion that it could not have been allowed to prevail. We are satisfied, that, upon the facts set forth in the complaint, it must have been held, that the plaintiff was entitled to maintain the action, in his own name, and on his own behalf, without any reference to the possible claims of other parties.

Where an action is brought against a trustee for a distributive share of a fund, which he is bound to distribute to different persons in unequal proportions, and the proportionate share of each has not yet been ascertained, it cannot be doubted, that all who are interested in the distribution, are necessary parties to the action; but it is equally certain, that, when the proportionate share of each distributee has been definitely ascertained, by a proceeding, binding on the trustee, each is entitled to demand the payment of the share belonging to him, and, when the payment is withheld, may maintain a separate action for its recovery. The liability of the trustee to each is, then, exactly the same, as if the sum, ascertained to belong to him, had been the only sum which the trustee had received, and had been directed to pay. The case is, then, brought within the application of a rule, which, however doubtful it may be regarded upon the English authorities, has long been the established law in this state—the rule, that where A places a sum of money in the hands of B, to be paid over to C, the latter may

maintain an action against B for its recovery, as so much money had and received to his use, even when no privity has been created between them by an express promise of payment. (*Weston v. Barker*, 12 John. R. 279.)

The sum of \$12,000, which was placed, in this case, in the hands of the defendant, belonged to the different insurance companies, by whom a total loss upon the cargo of the ship named in the complaint had been paid, and belonged to them in proportion to the sums which they had respectively insured and paid. It was his duty, according to the usage of merchants, to cause the sum that each company was entitled to receive to be ascertained, by an estimate or adjustment, to be made by persons of competent skill, usually employed for such purposes. And if such an adjustment was, in fact, made, it was binding on the defendant, unless shown to be erroneous, and each company became, at once, entitled to demand and receive payment of its proportionate share, as thus ascertained, and, if necessary, to enforce its payment by a separate action.

Now, as we read the complaint, it avers, with sufficient certainty, that an average statement or adjustment, showing the sum that each company was entitled to receive, and a copy of which is annexed to the complaint, and forms a part of it, was properly made; and that the plaintiffs have demanded payment of their proportionate share, as thus ascertained, and that such payment had been refused by the defendant. The complaint, therefore, in our opinion, contains an averment of all the facts, that the plaintiffs could be bound to prove upon the trial, to entitle them to recover in a separate action; and, hence, had a demurrer been interposed, either upon the ground of the insufficiency of the complaint, or of a defect of parties, it must have been overruled.

The observations that have been made, render it unnecessary to consider more particularly the question, whether the decision of the referee is a just conclusion of law, from the facts which he has found. He has found in favor of the plaintiffs all the material facts alleged in the complaint and put at issue by the answer, and of this finding, his decision, that the plaintiff was entitled to judgment, was a necessary result. We have already said that this finding was amply justified by the evidence before him, and we now add, that in our opinion, the proof was conclusive that the

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defendant had procured an adjustment to be made, the validity of which he had admitted, and by the payments he had made under it, was estopped from denying.

We all think that the demand of the plaintiffs for their proportionate share of the fund received by the defendant ought not to have been resisted, and that if there are any errors in the report of the referee, the errors are in favor of the defendant. It is very doubtful, taking into view all the circumstances of the case, whether he ought to have been allowed the commissions which the referee has deducted, and whether he ought not to have been charged with interest for a longer period than that for which it appears to have been computed.

The judgment upon the report is affirmed, with costs.

ROBERT C. VOORHIES v. WILLIAM H. ANTHON.

The defendant and two associates, owners of houses and lots on 21st street, entered into an agreement with the plaintiff, by which they severally bound themselves to pay to him the sum of \$200, in consideration of his erecting on certain lots in the rear of those owned by themselves, three or more dwelling-houses, covering the entire front of his lots, of such character and description as to be ineligible for tenement-houses, or for any trade or occupation likely to be offensive or injurious to them. He erected four dwelling-houses, covering the entire front of his lots, but one of them was constructed with a carriage-way or passage, unconnected with the house, but opening on the street, and leading to the rear of the lot, so that stables or other buildings might have been erected, having a common entrance and exit by the carriage-way, on the rear of each lot.

Held, that as the manifest object of the defendant and his associates was to prevent the erection on the plaintiff's lots of any building that might operate as a nuisance to themselves, and as the opening of the carriage-way would enable the plaintiff to erect such buildings, should he deem it expedient, it was a breach of the spirit and intention of his agreement, and, therefore, a bar to his recovery of the sum which the defendant had stipulated to pay.

Verdict for plaintiff set aside, and order granting a new trial affirmed, with costs.

(Before DURN, BOSWORTH and SLOSSON, J.J.)

Heard, October; decided, December, 1855.

APPEAL by the plaintiff from an order at Special Term, setting aside a verdict for the plaintiff, and granting a new trial.

The action was brought to recover the sum of \$200, with interest, which the plaintiff alleged to be due to him from the defendant,

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under the following agreement, which is set forth in the complaint, and was read in evidence on the trial.

This agreement, made this seventh day of March, one thousand eight hundred and fifty-four, between William H. Elphinstone, James B. Colgate, and William Henry Anthon, parties of the first part, and Robert C. Voorhies, party of the second part, witnesseth :

Whereas the parties of the first part are the owners of the premises numbers one hundred and twelve, one hundred and fourteen and one hundred and sixteen East Twenty-first street, in the city of New York, respectively.

And whereas, it is important to the said parties of the first part that the lots immediately in the rear of said premises, and also the lot adjoining said rear lots on the west, should be improved as speedily as possible, by the erection thereon of genteel dwelling-houses, equal, in point of appearance, to the said premises so occupied by said parties of the first part, of brick or stone, as the party of the second part may elect, and that said dwelling-houses shall be of such class and character as to command genteel and respectable tenants.

Now, then, know all men by these presents: That the party of the second part, for the consideration hereinafter mentioned, hereby agrees with the parties of the first part to purchase the said lots so lying in the rear of the premises of the parties of the first part, and to erect thereon and upon the lot immediately adjoining said lots on the west, three or more dwelling-houses, covering the entire front of said lots, equal in point of appearance to the premises of the parties of the first part, and of such character and description as to be ineligible for tenement houses or for any trade or occupation likely to be offensive or injurious to the parties of the first part; such dwelling-houses to be constructed of brick or stone, as the party of the second part shall elect, and not to exceed sixty feet in depth.

In consideration whereof, the parties of the first part, each for himself, and not one for the other, severally agree to pay the party of the second part the sum of two hundred dollars, when said buildings shall be enclosed, the above agreement to bind the heirs of the respective parties.

Voorhies v. Anthon.

In witness whereof, the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

WM. H. ELPHINSTONE. [L. S.]

WM. HENRY ANTHON. [L. S.]

JAMES B. COLGATE. [L. S.]

ROBERT C. VOORHIES. [L. S.]

The defence was, that the plaintiff had not performed the agreement.

The cause was tried before the Chief Justice and a jury, in November, 1854.

It was proved on the part of the plaintiff, that he had erected four first-class dwelling-houses on the lots mentioned in the agreement, and apparently covering the entire front of the lots, but it appeared, that on the most westerly of the lots, there was a covered carriage-way extending from the front to the rear of the lot, and that, as the buildings stood, stables might be erected on each lot, in the rear, and have a common entrance and exit by this carriage-way. It was proved, on the part of the defendant, that he and the other signers of the agreement, had given notice to the plaintiff, in writing, that they would consider this passage or alley-way to the street, as a breach of his agreement, and would hold him liable to them in damages, and that the plaintiff had declared, that if the defendant and the other signers should refuse to pay him the stipulated sum, according to their agreement, he would put up a factory or some other building in the rear of the lots, to annoy them.

The Judge left it to the jury, to determine whether the plaintiff had performed the agreement, and, according to its true meaning, had covered the entire front of the lots.

The jury found a verdict for the plaintiff, for \$200, and interest.

Upon a case, the defendant moved for a new trial, at Special Term, on the ground that the verdict was contrary to law and evidence, and Mr. Justice Bosworth granted the motion.

H. G. De Forest, for the plaintiff, contended, that the order granting a new trial, ought to be reversed, and a judgment upon the verdict be entered for the plaintiff. The verdict was fully justified by the evidence.

J. Anthon, for defendant, insisted, that it was immaterial whether the plaintiff had, or had not complied with the letter of his agreement, since he had plainly violated its spirit and intention, and that his threat, to erect a factory or some other building in the rear of the lots, to annoy the defendant and his associates, was conclusive proof that he was conscious, himself, that he had violated his covenant in its actual intention, even while he claimed to have performed it accurately to its letter. He cited, *T. Raymond*, 469; 6 *John*. 49; 2 *Cow*. 981; 22 *Wend*. 140.

BY THE COURT. SLOSSON, J.—In reading the covenant in question, especially in the light thrown upon it by the conversation between the plaintiff and Colgate, one of the parties to it, before the instrument was in fact executed, it is not difficult to determine what were the motives which induced the parties to enter into the contract, and what was their real intention in so doing. The possible appropriation of the vacant lots to purposes which might prove an annoyance or injury to the premises on Twenty-first street, was the inducement or motive to the arrangement, and the prevention of such an appropriation was the object which the owners of those buildings (the parties to the agreement of the first part) intended to secure. They accordingly provided in their agreement with the plaintiff, that the vacant lots in question when purchased by the plaintiff, and also the westerly lot adjoining, then owned by him, should be improved by the erection of buildings thereon, of a class equal, in appearance, to their own, and covering the entire front of the lots, and so constructed as to be ineligible for any trade or occupation likely to be offensive or injurious to their own property.

The instrument does not, in terms, designate any particular occupation as offensive or injurious, except tenement houses, but as that particular is followed by the general clause in question, it is manifest that the parties understood each other, as excluding all modes of occupation which would have the effect to injure the value of the property of the owners on 21st street—the buildings to be erected were not only, within the spirit and true meaning of the agreement, not to be built for such offensive purposes, but they were to be so constructed as to be “ineligible” therefor; the

instrument thus guarding, as much as possible, against the possibility of the appropriation of the premises to any such use.

It may even be conceded (though I do not so concede) that the covenant is complied with, on the part of the plaintiff, in so far as the stipulation to cover the entire front of the vacant lots is concerned, but this would not answer the whole condition of the stipulation.

By constructing a carriage-way through the whole depth of the westerly building, leading from the street to the yard, the plaintiff has shown an intention to reserve to himself, and has, in fact, reserved to himself the power and facility of connecting with that building, as a means of its greater enjoyment, some other building, to be constructed in the rear; and that he himself considered the carriage-way as a means by which the premises might be converted into a nuisance, is evident, from the fact, that, when remonstrated with for having constructed it, he threatened, that, if the parties to the agreement did not pay him what they had stipulated, "he would put up a factory in the rear, or something else, to annoy them." To say, in the face of this, that a building so constructed is "ineligible for any occupation likely to be offensive or injurious" to the owners on 21st street, would be doing violence to the common sense of the whole agreement.

It was not, alone, the construction of buildings in themselves nuisances, which was intended to be guarded against, but the construction of buildings which could be converted into nuisances, or which could be used for purposes "likely" (in the language of the instrument) "to be offensive or injurious."

A covenant is not fulfilled, when its intent and spirit are broken, though complied with in the letter. (Com. Dig. Tit. Cov. E. 2; 2 Cowen, p. 786.)

The obvious and palpable intention of the plaintiff, in constructing this carriage-way, from which there is no entrance into the dwelling-house, and which can only be entered itself from the outside, at either end, was to connect it, at some future time, with a stable, to be erected in the rear, and as an appurtenance to the dwelling-house. This would be, of itself, "offensive" to the occupants of the houses in 21st street, and, consequently, "injurious" to the property; but the plaintiff would not be restricted to this particular kind of annoyance, since the passage in question would

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furnish an equally convenient access to a factory, or other offensive establishment. True, he has not yet erected the nuisance, and may never do it, but he has reserved the means to do so, and has himself created the temptation, and manifested the intention to do it, at least to the extent of erecting a stable in the rear.

Unless for some such object, the carriage-way would be utterly useless. As already said, there is no entrance into the dwelling-house from it; but it forms a clear and open passage, from front to rear, and is only to be entered from the outside of the building, at either end. Its object is too manifest to allow of a doubt, and we think the construction of this carriage-way a clear violation of the contract.

The order granting a new trial is affirmed, with costs.

FREDERICK BERLEY v. ADOLPH R. RAMPACHER and MARGARET
his wife.

The act of the legislature of 1848, giving to every female, who might thereafter marry, all the real and personal estate owned by her at the time of the marriage, as her sole and separate property, did not operate as a repeal of the common-law rule, making the husband liable for all the debts of the wife contracted by her before the marriage.

A statute is never construed as abolishing or modifying a rule of the common law, unless by express words, or necessary implication. The rule, if not plainly inconsistent with the statute, remains in force.

The act of 1853, exempting the husband from his common-law liability, ought not to be construed as affecting the vested rights of creditors. So construed, it would be unconstitutional and void.

Held, therefore, that the remedy of the plaintiff was not limited to the separate estate of the wife, but that he was entitled to a common-law judgment against both defendants.

Judgment for plaintiff, accordingly, with costs.

(Before DUER, CAMPBELL and HOFFMAN, J.J.)

Heard, December, 1855; decided, January, 1856.

APPEAL by plaintiff from a judgment at Special Term.

The action was brought to recover the price of certain goods and merchandise, sold and delivered to the defendant Margaret, while a single woman. The complaint alleged that the debt was contracted in the city of New York, and became due on the 3d of

October, 1850; and claimed judgment for its amount, \$116 $\frac{1}{2}$, with interest from that day.

The defendant Margaret consented, by her answer, that judgment should be entered against her, and execution be issued thereon, according to the provisions of the act of the legislature, passed June 18th, 1853, entitled "An act relating to debts contracted by women before marriage."

The defendant Adolph averred, in his amended answer, that he intermarried with the defendant Margaret, on or about the 25th of October, 1850, in the city of Philadelphia, where he then resided, and continued to reside, until about the 1st of May, 1854, when he removed to the city of New York. He denied that he had ever received any of the goods mentioned in the complaint, or was indebted to the plaintiff, in any sum of money whatever, but consented that judgment should be entered, according to the provisions of the above-mentioned act of 1853.

The case came on to be tried at a Special Term, before Mr. Justice Slosson, on the 14th day of March, 1855, without a jury, a trial by jury having been waived by consent of parties.

It was tried upon the pleadings, without evidence, the plaintiff, admitting the fact, stated in the amended answer of the defendant Adolph R. Rampacher, that his marriage with the defendant Margaret was solemnized on the 21st October, 1850, in the city of Philadelphia, where he then resided, and that the defendants continued there to reside till May, 1854, when they became residents of the city of New York.

The said Justice thereupon decided, that the plaintiff was entitled to judgment, for the sum claimed in the complaint, with costs before answer, and disbursements, to bind the separate estate and property of the defendant Margaret Rampacher, and not the property of the defendant Adolph Rampacher; and that the execution upon such judgments issue against such separate estate and property of said Margaret Rampacher, only, and not against the property of the defendant Adolph Rampacher; and that the defendant Adolph Rampacher have judgment for his costs, subsequent to the answer and execution therefor.

The counsel for the plaintiff excepted to the decision, upon the ground, that the plaintiff was entitled, in law, to an absolute judgment, against both defendants.

The cause was now heard upon a case containing the pleadings, judgment, and exception.

S. P. Nash, for the plaintiff, appellant.

The liability of the husband for the debts of the wife, contracted by her, *dum sola*, is a necessary incident to the marriage contract, by common law; and hence, the defendant Adolph, by his marriage, on the 21st of October, 1850, became thus liable for the existing debts of the defendant Margaret, and the plaintiff had then a clear right of action against them both. The act of 1853, if construed retrospectively, would not merely impair a remedy, but would destroy a vested right, by discharging an existing personal liability. It is not necessary so to construe it, and if so construed, it would be unconstitutional and void. (*Dash v. Van Kleeck*, 9 John. 479; *Wood v. Oakley*, 11 Paige, 400; *Morse v. Gould*, 1 Kernan, 281; *Bronson v. Kinsie*, 1 How. U. S. R. 411; *McCracken v. Hayward*, 2 id. 608.) The plaintiff is entitled to judgment against both defendants, with full costs. The offer, in the answer of the defendant Adolph, is not such as to entitle him to costs. (Code, § 304.)

D. P. Whedon, for defendants.

The only ground upon which the husband was liable at common law, for the debts of the wife contracted by her *dum sola*, was, that, by force of the marriage, he took all her personalty. The act of 1848, (Sess. Law, c. 200,) by giving to the wife all that she possesses at the time of the marriage, as her sole and separate property, destroyed this reason, and from that time the liability of the husband ceased, upon the maxim, that "*cessante ratione, cessat etiam ipsa lex.*" (7 Rep. 69; Broom's Maxims, 133.) The question, therefore, whether the act of 1853 has a retrospective effect, does not, necessarily, arise; but, if the court think otherwise, we contend that the act, thus construed, is constitutional and valid. It does not defeat or impair any vested right of creditors, but merely acts upon and qualifies their remedy. (*Sturges v. Crowningshield*, 4 Wheat. 122; *Mason v. Hale*, 12 id. 370; *Smith v. Thomson*, 22 Pick. 430; *Stocking v. Hunt*, 3 Denio, 274; *Foot v. Morris*, 12 Leg. Observer, 61.)

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The judgment at Special Term ought to be affirmed, with costs. It is the only judgment to which, upon the pleadings, the plaintiff can be entitled.

BY THE COURT. DUER, J.—If the rule of the common law, by which the husband is made liable for all the debts of the wife, contracted by her before the marriage, rested solely upon the transfer to him, which the marriage effects, of all the personal property of the wife, there would be great force in the argument, that the act of 1848, by preventing his acquisition of the property of the wife, has discharged him from his liability for her debts. The case might then, not unreasonably, be held to fall within the purview of the very sensible maxim, that "*cessante ratione, cessat etiam lex.*" But it is manifest, upon a very slight consideration of the authorities, that the acquisition, by the husband, of the property of the wife, is not the sole foundation of his common law liability for her debts, although it may justly be urged, as mitigating, in some degree, the severity of the rule. His liability, it is certain, is absolute and unlimited, without any reference whatever to the property which he acquires, or to which he may become entitled. It exists, even when the wife, at the time of the marriage, has no property at all, present or future, or when all that she then possesses, or to which she may become entitled, is settled to her sole and separate use. We cannot, therefore, say that the fact, or extent, of his liability, is at all affected by the provisions of the act of 1848. There is no more reason for saying, that a settlement, by a general law, of the property of the wife, to her separate use, can operate to discharge the husband from the payment of her debts, than a settlement of the same character, made by a husband or parent, before the marriage, by a devise or ante-nuptial contract. In both cases, the continued liability of the husband is entirely consistent with the legal effect of the settlement.

It is possible, and, perhaps, not improbable, that the legislature, in depriving the husband of that interest in the property of his wife, which the common law gave to him, meant to exonerate him from her debts, but we can deduce no such intention from the words, or the provisions, of the act of 1848; and it is needless to cite authorities, to show that it is only by express words, or by

a necessary implication, that a legislative enactment can operate as a repeal or alteration of an established rule of the common law. That there are express words of repeal, in the act of 1848, is not pretended, and it is just as certain, that it contains no provisions from which the intention to repeal must necessarily be implied. We must, therefore, hold, that the defendant, Adolph, became a debtor to the plaintiff, when he intermarried with the defendant Margaret, and that he was such debtor when the act of 1858 was passed. Has that act discharged him from this liability? The act provides, that an action may be maintained against husband and wife, jointly, for a debt of the wife, contracted before marriage, but that execution on any judgment in such action, shall only issue against, and the judgment shall only bind, the separate estate of the wife; and it is contended, that these provisions are clearly applicable to the case before us, and made it the duty of the Judge, at Special Term, to render the exact judgment that he has given, and which it is, therefore, our duty to affirm.

It is manifest, however, that we cannot so decide, without giving to the provisions of the act in question, a retrospective operation; nor, without holding, that the act thus construed, was a valid exercise of legislative power. We can do neither.

If the words of the act are not to be limited to marriages thereafter to be contracted, but must be construed as applicable also to those before contracted, and then existing, it is certain, and is not denied, that they would be retroactive, in their operation, upon pre-existing debts, and rights of action; but, we apprehend, that we cannot give such a construction to the act, without a denial of principles that have long been settled, and from which, we trust, that no court of justice would willingly depart. The plaintiff, in the case before us, when the act of 1858 was passed, had a vested right of action against both the defendants. The husband, as well as the wife, was then his debtor, and the property and estate of the husband would have been bound by the judgment he was then entitled to obtain. If the defence that is relied on, is allowed to prevail, and the plaintiff is to be deprived of the judgment that he claims, it is clear, that the act of 1858 has not merely interfered with, but has taken away and annulled his vested rights. We hold, that we have no right to give such a construction to the act, unless it is forced upon us by the words that are used. We

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have no right to adopt the construction, if there is any other more reasonable and just, of which the words are susceptible.

The leading, and much debated case of *Dash v. Van Kleeck*, qualified and explained by subsequent decisions, has established the rule, that no enactment, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or suits, unless the intention, that it shall so operate, is expressly declared. Although the words of the statute are so general and broad, as in their literal extent, to comprehend existing cases, they must yet be construed as applicable only to such as may thereafter arise, unless the intention to embrace all, is plainly and unequivocally expressed. (*Dash v. Van Kleeck*, 7 John. 499; *Butler v. Palmer*, 1 Hill, 825; *Johnson v. Burri*, 2 Hill, 288; *Wood v. Oakley*, 11 Paige, 408; vide also as to the rule in England, *Torrington v. Hargreave*, 5 Bing. 489.) It cannot be denied, that the general words of the act of 1853, are susceptible of the construction for which the defendants contend, but there is no pretence for the assertion, that they contain a declaration, that this construction shall be given to them. The general rule, therefore, as to the construction of statutes, must control our decision, that the act in question was designed to operate prospectively and prospectively alone, and, consequently, that the legal rights of the plaintiff were not affected by its provisions.

But we shall not stop here. Had the act of 1853 declared in terms that its provisions should be construed to apply to existing debts, or were we bound to give that construction to its provisions, as they stand, we should then be constrained to hold, and would have no difficulty in holding, that the act, so far as sanctioning that construction, would be inoperative and void. Not void, as repugnant to one of the plainest rules of natural justice, but as repugnant to a vital provision, adopting and consecrating that rule, in the constitution of the state.

If the act of 1853 is to be construed, as releasing the defendant Adolph, from his personal liability as a debtor to the plaintiff, it is plain, that it would operate, in respect to the plaintiff, not as a limitation of his remedies as a creditor, but as the confiscation of a debt; of a debt which, as then due, he had an immediate right to recover; and, it seems to us equally clear, that the act, thus construed, would involve a direct violation of that provision in the

constitution which declares, that "no person shall be deprived of life, liberty, or property, without due process of law." Upon this question, we regard the decision of the Court of Appeals in the recent case of *Westervelt v. Gregg*, (2 Kernan, 202,) as a controlling authority, for, as we read that decision, it has settled the law, that an immediate right of action, for the recovery of a debt, is property, within the meaning and protection of the constitution. In delivering his judgment in that case, Mr. Justice Denio expressed himself as follows: "An immediate right of action, for the recovery of money, which, when recovered, is to belong to the party in whom the right of action exists, subject to be defeated only by the contingency that a person in being may die before a judgment can be obtained, is a valuable pecuniary interest, which deserves protection equally with rights, which are absolute and unconditional." It was upon the truth of this proposition that the judgment of the Court of Appeals was founded, and it cannot be denied, that its terms embrace, just as certainly and as fully, the case before us, as that which was the subject of the decision.

For these reasons, all the Judges of this court—for, considering the importance of the question, we have felt it our duty to consult them all—concur in the opinion, that the judgment at Special Term, following the provisions of the act of 1853, was erroneous, and that the plaintiff is entitled to a judgment against both the defendants, for the amount of the debt that their answers, in effect, admit to be due, together with interest and costs, according to the prayer of his complaint.

The judgment appealed from is, therefore, reversed, and as the questions involved arise upon the pleadings alone, and cannot be varied by a new trial, a final judgment for the plaintiff, such as has been stated, must now be entered.

HOFFMAN, J.—It is insisted that the plaintiff has a right to a judgment against the husband as well as the wife.

It is not denied that, but for the statutes of this state, he would have such a right. The common law made him responsible for the wife's debts incurred *dum sola*, whether he received property with her, or not. Yet if he was not sued before her death, he was discharged, whatever amount he may have received. (2 Kent's Com. 144.)

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In compensation for this liability, the common law gave the husband all the wife's personal property, or the power to acquire it; and likewise gave him all her subsequent acquisitions, by her own labor, or from the gift of others, unless they were expressly guarded from him.

The act of 1848, (ch. 200, § 1,) provided, that the real and personal estate of any female who might thereafter marry, and which she should own at the time of the marriage, should not be subject to the disposal of the husband, nor liable for his debts, and should continue her sole and separate property, as if she were a single female.

The third section of the same act enabled the married woman to take by inheritance, or by gift, grant, devise, or bequest, real and personal property; and to hold the same to her sole and separate use, and to convey and devise the same as if she were single, and the same should not be subject to the disposal of the husband, nor liable for his debts.

The effect of this statute upon the relations of the husband and wife, in this case, was, that he had no right to the property she possessed, or was entitled to, in October, 1850; nor to any which might be given to his wife during the marriage.

It deserves notice, that in the second section of the act, is a provision as to the property of women married at its passage. It is declared that her property shall be her sole and separate estate, as if she were single, except so far as the same may be liable for the debts of her husband heretofore (before the date of the act) contracted.

This act and the amended act, passed in 1849, (ch. 376,) were silent as to the continuance of the husband's common law responsibility for his wife's debts.

But the statute of July 18, 1853, (ch. 576,) provided that an action may be maintained against the husband and wife jointly, for the debt of the wife, contracted before marriage; but the execution on any judgment in such action, shall issue against, and such judgment shall bind the separate estate and property of the wife only, and not that of the husband.

By the second section, any husband who might thereafter acquire the separate property of his wife, or any portion of it, by any ante-nuptial contract, or otherwise, should be liable for the

debts of his wife, contracted before marriage, to the extent only of the property so acquired, as if that act had not been passed.

The first question is, whether a case like this, of a debt and marriage contracted before the act, is covered by its language and fair import? And I think it is.

• The language of the first section is without any qualification whatever. It may comprehend, and, grammatically, does comprehend, a case of the debt contracted before the act, as well as the marriage; a case of debt prior and marriage subsequent; or of both being subsequent.

The second section forms an exception to the first, and shows how the term husband is used in the first. Any husband who may hereafter acquire the separate property of the wife, shall be responsible for the debts contracted before marriage, to the extent only of the property so acquired.

I apprehend that the term husband comprises persons who were husbands at the date of the act, obtaining such property, for example, on the 19th of July, 1853.

I think also, that it is reasonable to suppose the legislature, in the act of 1853, (apprised that in the act of 1848 they had prevented the husband from taking existing property, or future acquisitions,) may have considered it an act of equity to exempt him from a general liability, and to adjust such responsibility by the measure of the property he might obtain.

On this assumption, then, the question is, whether the act is constitutional in its application to the present case?

On the 9th of October, 1850, when the goods were sold, the plaintiff had a right to look to the party with whom he contracted, for payment, to be obtained by the usual remedies. He had also knowledge of the fact, that as the law then stood, he should have the personal responsibility of any future husband, unless between the date of the sale and the marriage, a law might exempt such husband. On the 21st of October, 1850, he became entitled to that personal obligation. The act of 1853 divests him of it.

In considering the legal relation established between the parties by the marriage, it ought not to be overlooked, that the plaintiff was bound to know that the legislature had refused to allow the husband to take the wife's property. On the other hand, he

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was entitled to the benefit of the rule, that the husband was responsible, irrespective of any acquisition of property.

I do not think that the cases referred to, under the constitution of the United States, forbidding laws impairing the obligations of contracts, are as pertinent to the present as the cases upon retrospective laws, affecting existing rights, and interpreting the clause of our own constitution, that no one shall be deprived of property without due process of law.

The late case of *Westervelt v. Gregg*, in the Court of Appeals, (2 Kernan, 202,) is of the highest importance upon this subject. In 1840, a legacy vested in the wife of the defendant, under the will of her father. In 1846, a petition was presented to the surrogate for an account and payment of the legacy. In September, 1849, the surrogate settled the accounts, reserving the question to whom the legacy should be paid; and in November, 1849, after argument, he decreed payment to the husband. This being affirmed by the Supreme Court, an appeal was taken to the Court of Appeals.

The following points are deducible from the judgment:

That the husband, at the passage of the act of 1848, was entitled to prosecute for the legacy, and to take the money when recovered, to his own use; he had a right to assign it for valuable consideration, which would cut off the wife's right to it, in the event of survivorship. If he survived the wife, it would belong to him absolutely. It was only in case of his death first, and before possession taken, that she would take it.

That the second section of the act of 1848, upon its proper construction, did operate to take away this right from the husband.

That the right to recover the legacy was property. "An immediate right of action for the recovery of money, which, when recovered, is to belong to the party in whom the right of action exists, (subject only to the contingency of his death before judgment,) is a valuable pecuniary interest," and is protected by the constitution as property.

That the act of the legislature was, in this respect, therefore, void.

After a careful consideration, I am unable to discern a valid ground of distinction between this case and the present. The plaintiff acquired a right to resort, for recovery of his demand, to

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the property of the husband. In depriving him of this, the statute robs him of a substantial right to look to that property for his satisfaction. This is not a restriction of the extent of a remedy, which might, under circumstances, be valid, as in the furniture exemption act. (See *Morse v. Gould*, 1 Kernan, 283.) There is the actual withdrawal of a fund, to which the law had given him authority to have recourse, and, besides this, is the deprivation of the advantage of a personal responsibility which would arise from a judgment, independent of existing property.

In the case of *Foot v. Morris*, (12 Legal Observer, 61,) I had, in a case at Special Term, arrived, doubtingly, at a different result; and I expressed a hope that, as the case was new, it might be put in a way of revision.

I am now satisfied that my conclusion was wrong. I think too much effect was given to the act of 1848.

In our opinion, the judgment below should be reversed, and judgment be entered against both defendants, with costs, in the usual form.

WEED and Wife v. THE PANAMA RAILROAD COMPANY.

A passenger carrier is, by law, under an obligation to provide for the safe conveyance of the passengers, as far as human care and foresight can secure that result.

For injuries caused to a passenger by the misconduct of the carrier's agent, in his mode of running the cars and managing the train confided to his care and control, the carrier is liable.

The fact that such misconduct did not result merely from the inattention or misjudgment of the agent, but from a deliberate and conscious disregard of duty, and of his orders, and was, therefore, wilful, does not exempt the carrier from liability to the passenger whom he had undertaken to carry, and who is injured by such misconduct.

(Before BOSWORTH and WOODRUFF, J.J.)

January, 1856.

THIS action came before the court on a verdict taken for the plaintiffs, subject to the opinion of the court at General Term. It was tried before Ch. J. Oakley and a jury, in March, 1855.

It was brought to recover damages, sustained by Mrs. Weed, one of the plaintiffs, while a passenger in the cars of the defend-

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ants, in consequence of the cars being left all night at a place between Obispo and Aspinwall. It was alleged in the complaint, that the place of detention was low, wet, and swampy, in the midst of a forest, remote many miles from any habitation, and without any building for the protection of persons thereat.

That the atmosphere at that place was exceedingly unwholesome, so much so as to produce disease, when persons are there exposed several hours. That it rained continually during the detention. That the delay was without any reasonable or justifiable cause, and that the plaintiff was obliged to sit or stand in the cars the whole night, without light, food, or water. That the plaintiff became sick by reason of the unwholesomeness of the place, and suffered great pain, so that her life was despaired of, and she has suffered greatly in body and mind, from that time to the commencement of this action.

The answer put the allegations of the complaint at issue.

Several witnesses were examined at the trial.

When both parties had rested, the counsel for the defendants moved to dismiss the complaint, on the ground, that there was no proof of any contract between the plaintiffs and defendants; but the court overruled the motion, on the ground, that the duty of the defendants, in carrying the plaintiffs arose out of permitting them to travel in the train as passengers: to which decision, the counsel for defendants excepted.

The defendants' counsel also moved to dismiss the complaint, on the ground, that there was no proof, either of wilful misconduct or negligence, on the part of defendants or their agents; but the court overruled the motion, to which decision the counsel for defendants excepted. The counsel then summed up to the jury. The plaintiffs' counsel insisted that the evidence established that the conductor designedly left the train, at Barbacoas switch, having that intention when he left Obispo, and that, for this reason, exemplary damages might be given.

When he had concluded his remarks, the presiding Judge inquired whether he meant to put his case on the ground he had advanced, viz.: that the conductor wilfully misconducted himself, in arresting the train and leaving it.

To which plaintiffs' counsel answered, that he claimed damages on both grounds, wilful misconduct and negligence.

Thereupon, the counsel for the defendants asked the court to charge the jury, that if the conductor acted wilfully in the detaining of the train, the defendants were not liable for that, as there was no evidence that they authorized or approved such misconduct.

The presiding Judge directed the jury to answer the following questions, which were submitted to them, in writing:—

First. Was the detention at the Barbacoas station, by the conductor of the defendants, a wilful act of the conductor?

Second. In detaining the train, as he did there, did the conductor act negligently, or without reasonable care and judgment?

The jury answered each of these questions in the affirmative, and assessed the damages of the plaintiff at two thousand dollars.

Thereupon, the presiding Judge directed that proceedings should be stayed, on such verdict, and a case made to be heard at the General Term, in the first instance, as to what judgment, if any, should be rendered on such verdict, with liberty to either party, after a decision at such term, to turn the case into a bill of exceptions, as if the decision of the General Term had been the charge of the court at the trial, and exceptions had then been taken to it.

A. J. Willard, for plaintiffs.

Jas. T. Brady, for defendant.

BY THE COURT. BOSWORTH, J.—The jury have found, that the detention of the cars, between Obispo and Aspinwall, by the conductor of the defendants, was—first, “a wilful act of the conductor;” second, that, in detaining the train as he did, the conductor acted “negligently, or without reasonable care and judgment.”

The inquiry, whether the act was a wilful act, the jury must have understood to have been an inquiry whether it was done, knowing that it was a violation of his duty, and conscious that there was, not only no necessity for it, but that it was without any thing existing to excuse it. Understanding the jury to have found, that the act, of stopping and leaving the train over night, was such an act of wilful misconduct, the question arises, Is the defendant liable for the damages resulting to Mrs. Weed?

Weed v. Panama Railroad Company.

In *Vanderbilt v. The Richmond Turnpike Co.*, (2d Coms. 479,) the Court of Appeals decided, that a corporation is not liable for a wilful trespass upon a stranger, committed by a person employed by it, although the act be authorized by its president and general agent. In that case, the defendant's boat was designedly run against the plaintiff's boat, by the agent of the defendant. That act was a wilful trespass. The action was brought to recover damages for the injury resulting from it. It was held, that, for such an act of the agent, the corporation was not liable.

What rule should have been applied, if a passenger on the defendant's boat had been injured, by such misconduct, and an action to recover damages had been brought by him, was not stated, nor was any opinion intimated by the court. In the case cited, the defendant owed no duty to the plaintiff, except such as each citizen owes to every other.

In the case at bar, the defendant owed to each of the plaintiffs such duties as the law imposes upon common-carriers of passengers, in respect to persons whom they undertake to carry from point to point, upon the route on which their business is conducted.

The conductor, as the agent of the defendant, had charge of the train. Its movements, under the rules and regulations of the company, were confided to him. In leaving the train where he did, he was acting in the course of his employment. He was as clearly so acting, as in moving forward the train to the place at which it was left. The cars, and the passengers on board of them, were intrusted to his care and control.

Whether he left them where he did, in known disobedience of the general regulations, or of a special order of the company, cannot affect the question of the actual liability of the company. (*Phil. and Reading Railroad Co. v. Derby*, 14 How. (U. S.) S. C. R. 468.)

No case has been cited, nor has any come to our notice, which decides that a carrier of passengers is not liable to the latter for injuries resulting from the wilful misconduct of the carrier's agent, in his mode of managing the vehicle containing the passengers.

Wright v. Wilcox (19 Wend. 343) was not an action by a passenger against a carrier of passengers, but is the ordinary case of a suit by a third person, to whom the defendant owed no special duty, to recover for a wilful injury done by defendant's servant, while driving the defendant's carriage. It did not involve the question,

of the nature or extent of the liability of a passenger-carrier, for injuries to his passengers, resulting from the wilful misconduct of the servant, in the manner of transacting the business of the carrier.

The law imposes, upon the carrier of passengers, the duty of providing for their safe conveyance, as far as human care and foresight can secure that result.

He is bound for a due application, on the part of his servants, of the necessary attention, art and skill.

In *Stokes v. Saltentall*, (13 Peters (U. S.) R. 181-191,) the court stated, as a sound principle, that, although a carrier of passengers "does not warrant the safety of the passengers, at all events, yet his undertaking and liability to them, go to this extent: that he, or his agent, if, as in this case, he acts by agent, shall possess competent skill; and that, as far as human care and foresight can go, he will transport them safely."

If he is under an obligation, or duty, that his agent shall employ the highest degree of care and foresight, for the safe conveyance of the passengers, is not the failure to discharge the obligation, or perform the duty, as absolute, when it results from intentional mismanagement, as when it is caused by slight or gross inattention of the agent?

The case of the *Phila. and Reading Railroad Co. v. Derby*, decides, that the carrier is not exonerated from liability, merely because the agent acted in disobedience of the positive orders of the principal. In that case, the defendant requested the Judge, at the trial, to charge the jury: "that the employer is not responsible for the wilful act of his servant." (Id. 470.) The Judge charged, "that, though the master is not liable for the wilful act of his servant, not done in the course of his employment as servant, yet, if the servant disobeys an order relating to his business, and injury results from that disobedience, the master is liable, for it is his duty to select servants who will obey. The disobedience, in this case, is the *ipsa negligentia*, for it is not pretended by the defendants that the Lycoming was intentionally driven against the Ariel."

The latter remark may be thought to imply an opinion, that if the disobedient servant intentionally drove his locomotive against the one by which the defendant was drawn, the defendant would

Weed v. Panama Railroad Company.

not be liable to any passenger on either train, for the injuries which might result to him from such an act.

As to this, it is sufficient to say, that the Judge did not declare such to be the rule, nor does the opinion of the court sanction it.

Passengers are not unfrequently injured by the improper position in which a switch is left, or by a train being started forward on a single track, when a train is overdue from the opposite direction. Do the rights of injured passengers, in such cases, depend upon the question, whether the switch was left out of place, or the train started prematurely, in consequence of the mere inattention of the agent of the company?

Is it settled law, that if the act resulted from negligence, the carrier is liable, but is not liable if the act was one of intentional dereliction from duty, and done with knowledge that the passengers were thereby exposed to new and great hazards?

If wilful misconduct of the agent of a passenger carrier, in the mode of transacting the business of the principal, will exonerate the latter from all liability to the passengers for the injuries they may receive from such misconduct, then what is the true limitation of the rule?

If, in this case, the act of wilful misconduct, resulted from feelings of hostility to one of the two lines of steamers running between Aspinwall and New York, and if done to diminish its chances of obtaining the carrying to New York any of the passengers in that train, would the defendant be absolved from liability?

If the motive, which produced the act, was devoid of ill-will towards the passengers, and contemplated no injury to them, beyond the mere inconvenience of being in the cars all night, while the conductor was comfortably lodged at Obispo, and in order that he might be so lodged, is the defendant exempt from liability?

If the motive was ill-will towards the passengers, and the act was done from a deliberate and perverse purpose, to expose them, to the danger of contracting disease, either from such exposure in a rainy night, or from the unhealthiness of the spot in which the cars were left, is the defendant without liability for the act? And must the motive be such as last supposed; that is, ill-will towards, or a purpose to hazard the safety of the passengers, in order to exonerate the defendant from all liability for the acts of its agents?

It would be in the highest degree, detrimental to the public safety, to establish the rule, that passenger carriers are not liable for injuries caused to their passengers, by the deliberate and intentional misconduct of the carrier's agent, in the mode of conducting the business of the principal.

Every known disobedience of a general regulation, or special order of a railroad company, may properly be denominated wilful misconduct. In most cases, the agent so disobeying, is conscious at the time, that he is exposing the passengers to greater, and often, to imminent hazards.

In such cases, the carrier has failed to perform the duty of doing all that human care and foresight could do for the safety of the passengers. By a statute of this state, a carrier of passengers, who conveys passengers upon any turnpike road or public highway, is liable to the party injured, in all cases, for all injuries and damages done by any person in his employment, while driving the carriage of the carrier, whether the act be wilful or negligent, or otherwise, in the same manner as such driver would be liable. (1 R. S. 696, sections 6 and 7.)

This act, by its terms, relates only to carriers of passengers, upon turnpike roads or the public highway. Its existence, however, illustrates the rule, which public policy, in the view of it entertained by this state, requires should be enforced. That act makes the passenger carrier, to whom it relates, liable, not only to his passengers, but to all others, for any injury of the agent, while driving the carriage of his principal, and as well when his misconduct is wilful, as when it is merely negligent. These defendants were incorporated by the legislature of this state.

There is nothing, in any adjudged case, nor in the nature and extent of the duty which the carrier owes to his passengers, nor in the principles of public policy, acted upon in this state, sanctioning the principle, that a railroad company is not liable to its passengers for the wilful misconduct of its agent, in his mode of running the cars confided to his care and control.

A carrier of merchandise is responsible for any injury to it, caused by the wilful trespass of his servants, during its transportation.

Can any reason be assigned, why the liability of a passenger carrier should not be the same, in respect to any injury to the

person of the passenger, caused by the servant of the carrier, in the course of his employment as such, or while the passengers are subjected to his care and direction, for the purpose of being conveyed to their destination?

Passengers being sentient beings, capable of, and at times, determined upon locomotion, while the cars are running, their own negligence or rash conduct, in some instances, may contribute as much to a casualty which injures them, as the negligence of the carrier or of his agents.

But when a passenger, in the course of his passage, is injured solely by the act of a servant, to whose care and control the passengers, and the cars containing them, are confided, and under circumstances making it impossible, by the exercise of any discretion on the part of the passengers, either to prevent the wrongful act, or to mitigate its injurious consequences, why should the carrier be exonerated, on the ground of the wilful or malevolent purpose of his agent, when his liability would be unquestionable, if the injury had been to property, instead of persons?

But it is not necessary to apply so stringent a rule of liability, to entitle the plaintiffs to a judgment on the verdict.

I do not think, that the form of the verdict necessarily affirms, that the conductor stopped and left the train where, and as he did, from a design to injure the passengers, or believing that either of them would contract any disease in consequence of it. No such position appears to have been taken at the trial, and, therefore, no such fact is necessarily affirmed by the verdict. It was insisted at the trial, that the conductor designedly left the train at the Barbacoas switch, having that intention when he left Obispo.

The verdict undoubtedly finds, that the act did not result from mere misjudgment, or negligence in not informing himself as to the condition of the road, and that the train could be safely passed over it that night.

It does not necessarily affirm more, than that he deliberately disobeyed the orders of the company, or consciously and perversely disregarded his duty, for the mere purpose of consulting his own ease and comfort for the night, regardless of that of the passengers.

We do not think, that any consideration of public policy, or the proper application of any well settled rule of law, justifies us in

holding, that the defendant is not liable to a passenger for the injuries caused by such misconduct.

The only question left, relates to the damages. What rule of damages was given by the court to the jury is not disclosed by the case. Whatever it was, no exception appears to have been taken to it. The plaintiffs' counsel insisted that exemplary damages might be given, if the conductor wilfully misconducted himself in leaving the train at the Barbacoas switch. The defendants' counsel insisted that there was no liability on the part of the corporation, if that fact should be found by the jury. There is nothing in the case from which it can be inferred that the court instructed the jury, that in their discretion they might find exemplary damages, in case they also found the fact of wilful misconduct, but could not, if they found his conduct to be merely negligent.

There is, therefore, not only no exception to any ruling of the Judge at the trial, in respect to this matter, but there is nothing to show what instruction was given. The only inference that can be drawn is, either that the Judge told the jury, that whether they found the act to be one of negligence, or of wilful misconduct, the rule of damages was the same, and that no heavier damages could be given in the latter case than in the former, or that he submitted the special questions with such remarks as were satisfactory to the defendants' counsel, or that the jury were left, by common consent, to assess the damages at such amount as they might deem to be just.

A new trial cannot be granted, therefore, on account of any erroneous instruction to the jury, in relation to the damages. We are not asked to grant it on account of excessiveness of damages. No point was taken at the trial, or on the argument of the appeal, that damages were asked, or have been given, for any cause besides the injuries to, and sufferings of, Mrs. Weed.

Judgment should be entered for the plaintiffs on the verdict.

HUNT v. BLOOMER and wife.

In a suit brought to foreclose a mortgage given to secure the payment of a bond conditioned for the payment of a sum of money on a specified day, parol evidence is inadmissible to show that at the time of the delivery of the bond and mortgage there was a verbal agreement that the money should not be due until a later day.

The bond was payable on the 17th day of May, 1855, with interest, payable half-yearly, and the money loaned by the plaintiff was advanced on the 22d of May, 1854, and it was conceded that on the 17th of May, 1855, full six months' interest was paid. In such case, it will be presumed that a proper adjustment was made, on the payment of the interest for the first six months, (in August, 1854,) by an allowance for the five days, and in the absence of any proof, in relation to such previous payment, the court will not presume that the interest paid on the 17th of May, 1855, was more than was then due.

Payment by a debtor of a part of a sum of money, which is actually due and payable, is no consideration for an agreement by the creditor to forbear or give time for the payment of the residue.

An agreement by the creditor to give further time for the payment of a sum already due, in consideration of the debtor's agreement to pay more than legal interest, is binding upon neither party.

(Before BOSWORTH and WOODRUFF, J.J.)

January, 1856.

APPEAL from a judgment directing the sale of mortgaged premises.

The cause was heard before Duer, J., at Special Term, upon the pleadings alone, of which the substance is as follows:—

The complaint, filed on or about the 31st May, 1855, prays for the foreclosure of a mortgage, executed and delivered on the 22d day of May, 1854, to secure the payment of the defendants' bond, which, by the terms of the condition thereof, is payable on the 17th day of May, 1855, with interest in the mean time, payable half-yearly. The defendants answer—

That the bond and mortgage were given by the defendant Bloomer, to secure the repayment of a sum loaned to him by the plaintiff. That it was the understanding and agreement between them, that the said loan should be for one year, and that the principal sum named in the bond should not be due or payable before

the expiration of one year from the time when the same, (that is the money,) was delivered to the said Bloomer, and that if the day of payment is as alleged in the complaint, (i. e., May 17th, 1855,) it is wrongfully so, and should be the 22d day of May, 1855.

The answer then further alleges, that on the 17th day of May, 1855, the plaintiff "agreed with the said Bloomer, that in consideration that he would then pay six months' interest upon the principal, being the interest that would be due May 22d, 1855, and the sum of five hundred dollars of and upon the principal; the time for the payment of the balance of the principal should be extended to the 10th day of August, 1855." And in pursuance of said agreement, Bloomer did pay the sum of \$140, the interest on the principal sum that would be due on the 22d day of May, 1855, and five hundred dollars upon the principal, by reason whereof, the defendants insist that the balance of the principal is not due until August, 1855, and that this suit is, therefore, prematurely brought.

On the trial, the plaintiff, as stated in the case, waived all evidence of the defence, and moved the cause upon the complaint and answer and the bond and mortgage referred to, on the ground that the answer, if proved, would constitute no defence. And, thereupon, judgment for the plaintiff was ordered at Special Term.

Moody, for defendants, appellant.

R. E. Mount, for plaintiff.

BY THE COURT. WOODRUFF, J.—The question argued before us was, whether the agreement set up in the answer, under the circumstances therein alleged, operated to extend the time for the payment of the bond and mortgage to the 10th of August, 1855; and it seems to be conceded by the plaintiff's counsel, that if we are of opinion that the agreement was valid and operative for that purpose, we ought to reverse the judgment.

It is important to observe further, that, although the case does not so state, it was conceded on the argument, that the understandings and agreements mentioned in the answer, (and of which proof on the trial was waived by the plaintiff,) were by parol merely, and not under seal, nor even in writing.

Hunt v. Bloomer.

The cause was heard and decided upon that assumption and concession, and so as to embrace the inquiry, whether it would be competent to prove such agreements by parol, as well as whether, if proved, they could operate to affect the plaintiff's right to a judgment.

I observe then, first, that the bond and mortgage must be deemed payable on the 17th day of May, 1855. The alleged understanding and agreement that the loan should continue for one full year, cannot be permitted to control the terms of the instruments; these must be taken as conclusive of the actual agreement made at the time of execution and delivery thereof. And it is not insisted that the case exhibits any mistake upon which, under the pleadings herein, any reformation of this instrument is called for.

In this particular, the defendants' answer, and the points argued by their counsel are not quite harmonious. The answer insists, that by reason of the understanding, the day of payment is, or ought to be, the 22d day of May; and that the interest paid on the 17th of May was interest which "would be due on the 22d day of May," and makes the payment of the five hundred dollars of principal money, and the payment of this interest five days before either were, in fact, due, the consideration upon which the plaintiff agreed to extend the time for the payment of the residue.

The defendants' counsel, however, in his points and argument concedes, and not only concedes but claims, that the day of payment named in the condition of the bond and mortgage, must control, and that for all the purposes of this appeal, the principal and interest must be deemed to have been due on the 17th day of May, and he thereupon insists, that on that day one full year from the making of the loan, and the delivery of the bond and mortgage had not elapsed, and, therefore, that one hundred and forty dollars of interest money was not then payable, the period during which interest had been accruing lacking just five days of six months; and that the payment of \$140, on the 17th of May, when less than six months' interest had accrued, was the consideration for the plaintiff's agreement to extend the time of payment of the bond and mortgage to the 10th of August.

Two questions are suggested as involved in the defendants' claim.

First. Would a parol agreement, in consideration of the receipt

of the alleged excess over the interest, operate to extend the time of payment of the bond and mortgage? for, confessedly, a payment on account of the principal then due would have been no consideration for such an agreement.

Second. Does it appear by the complaint and answer that the payment of the \$140 on the 17th day of May, was a payment of more than was due, so as to constitute a consideration for a valid agreement to forbear?

It does not appear by the case before us, in any manner, that any other sum had been paid by the defendant Bloomer, for interest, since the making of the bond which the answer avers bears date the 17th day of May, 1854, (though the money was not advanced until the 22d.) It is suggested, that we may infer that at the end of six months the defendants paid six months' interest; and if so, that something less than six months' further interest had accrued on the 17th of May following. We ought not, perhaps, on such an appeal, to indulge in any mere conjecture regarding the facts, but it seems quite as probable that six months from the date of the bond, (17th day of November, 1854,) would be, and was in truth, taken by the parties for the adjustment of the semi-annual interest, as that they departed from the letter of the instrument by delaying the collection to the 22d, and that when at the end of six months from the date of the bond, the first payment of interest was made, any abatement which was just to the defendants, by reason of the original delay of five days in advancing the money, was adjusted as it ought to have been between the parties. In this view of the subject, it does not appear at all that the whole sum of one hundred and forty dollars, paid on the 17th of May, was not due. It was fully due for just six months' interest, and, as conceded by the defendants' counsel, was, by the terms of the bond, payable on that day. So also the sum of \$500, paid on account of principal moneys, was confessedly due on that day.

This being conceded, there was no consideration for the agreement to forbear. The plaintiff not only did not receive more than was lawfully due, but he might have required the whole sum named in the condition of the bond. Payment by the debtor of a part of a sum already due and payable, is no legal consideration for an agreement to extend the time for the payment of the residue, or for any other agreement.

On the other hand, let it be assumed, that six months' interest was paid the previous November, without any abatement for the five days' delay in advancing the money, so that it be taken as claimed by the defendants' counsel, that on the 17th day of May, 1855, the whole \$140 had not accrued, and that there was then an agreement, that the defendants should not only pay interest upon the residue of \$3,500 of principal, but as a further compensation for forbearance until the 10th of August, should also pay the \$140, (including therein five days' interest, which had not accrued.) If this be taken as the real state of the case made by the answer, (and unless it be, there was no consideration for the agreement,) then plainly the agreement to extend the time of payment to August, was void for illegality—it was usurious. However small the pecuniary consideration over and above the legal interest, if there was any, it made the agreement void, and the defendants were not bound by it—neither was the plaintiff. The defendants may recover back the consideration so paid. The defendants might immediately thereafter have filed their bill, and had a decree for redemption.

The result is this, (the consideration, if any, for the alleged agreement, being, confessedly, the payment of a small excess of interest,) such agreement was either without consideration and void for that reason, or it was made upon a usurious consideration, and, on that ground, was ineffectual.

This renders it unnecessary to consider whether, or under what circumstances a parol agreement may operate to extend the time for the payment of a bond or the performance of an agreement under seal.

As to which, see *Fleming v. Gilbert*, 3 J. R. 527; *Keating v. Price*, 1 John. Ca. 22; *Latimer v. Harson*, 14 J. R. 330; *Dewey v. Derby*, 20 J. R. 461; *Erwin v. Saunders, &c.*, 1 Cow. 249; *Frost, &c., v. Everett*, 5 Cow. 497; *Dearborn v. Cross*, 7 Cow. 48; *Bailey v. Johnson*, 9 Cow. 115; *Langworthy, &c., v. Nutt*, 2 Wend. 587; *Pearl v. Wells*, 6 Wend. 291; *Blood v. Goodrich*, 9 Wend. 68; *Delacroix v. Bulkley*, 13 Wend. 71; *Allen v. Jaquish*, 21 Wend. 628; *Eddy v. Graves*, 23 Wend. 83; *Nelson v. Sharp*, 4 Hill, 584.

I forbear to place reliance upon the obvious doubt, whether in any aspect of the case, the circumstance, that the interest was paid five days before it became due, ought, as matter of fact, to be

deemed to have been regarded by the parties themselves as any consideration or motive to the alleged new agreement. The difference of only a few cents probably never was thought of by either, and even if it was paid, was no motive or inducement to the alleged agreement, and was not so regarded. Probably, if more interest was paid than was due, it was a mere inadvertence, but I have felt bound to take the facts as alleged in the answer, instead of resting upon my own inferences in this respect.

The judgment should be affirmed, with costs.

ARNOLD v. The ROCK RIVER VALLEY UNION R. R. Co., A.
HYATT SMITH, and J. BODWELL DOE.

An answer which denies that the endorser of a note received due notice that payment of it had been demanded and refused, does not make a notary's certificate of the facts inadmissible as evidence, although the answer be verified. To produce that result, an affidavit must be annexed to the answer, denying the receipt of notice of non-payment. An answer containing such a denial, would not satisfy the statute. An answer, like a plea before the Code, performs only the office of a pleading, and whatever its allegations, does not affect the question as to the nature of the evidence admissible to establish controverted facts.

An instrument, which, in its terms and form, is a negotiable promissory note, does not lose that character because it also states, that the maker has deposited bonds as collateral security for its payment, and that he agrees, on non-payment of the note at maturity, that they may be sold in a manner, and upon a notice specified, and he will pay any deficiency necessary to satisfy the note, and the expenses of such a sale.

The whole sum named, being made payable to order, on a day certain, in money, and absolutely, and the collateral contract, relating solely to the money promised to be paid, and being in addition to the principal contract, and not in terms, or legal effect, a modification of it, the note, as to the sum promised to be paid absolutely, is negotiable, and the endorsers of it may be charged and prosecuted as endorsers of negotiable paper.

(Before Bosworth and Woodruff, J.J.)

January, 1856.

THIS action came before the court on an appeal from a judgment in favor of the plaintiff. It was tried before Ch. J. Oakley, and a jury, on the 19th of March, 1855.

The action was brought upon an instrument, in the words and figures following, viz:—

Arnold v. Rock River Valley Union R. R. Co.

"NEW YORK, January 31st, 1853.

"\$5,000.

"Six months after date, the Rock River Valley Union Railroad Company promises to pay to the order of A. Hyatt Smith and J. Bodwell Doe, for value received, at the Hanover Bank of this city, five thousand dollars, having deposited with Elisha Peck, as collateral security and pledge for the payment of this note, ten bonds of the said Railroad Company, of one thousand dollars each, numbered as follows—758, 759, 760, 761, 762, 763, 776, 783, 784, 786—and we hereby give the said Peck full power and authority, on the non-payment of this note at maturity, or at any time thereafter, to sell said bonds at the brokers' board, in this city, or at public or private sale, or so many as shall pay this note, on giving six days' notice, by advertising in the *Journal of Commerce*, in this city, and apply the proceeds of said bonds to the payment of this note; and in case the proceeds thereof, after paying the principal and interest due thereon, with all expenses of sale, shall be insufficient, we hold ourselves bound to pay the balance on demand.

"A. HYATT SMITH, *President*.[L. S.] . "WM. A. LAWRENCE, *Secretary*."

The complaint avers an endorsement of the note by Smith and Doe, and that it was passed to the plaintiff before maturity. That it was duly presented at the place mentioned for payment, and that payment was demanded, and refused; and that due notice of such demand and refusal was given to each of the endorsers.

The defendants, by their answer, put in issue the facts of the note having been duly passed to the plaintiff, or of its having been so passed before maturity. They say that it was made by the company, without any consideration, and was endorsed by Smith and Doe, for the accommodation of the company, and entrusted to one Chittenden, to raise money thereon for the use of the company. That the company had never received, nor had Chittenden ever paid any consideration therefor. That Chittenden, in violation of the trust reposed in him, transferred the note, without any consideration paid to or received by him at the time, and that the plaintiff did not give, or part with, any consideration therefor.

All the defendants deny a presentment at the place mentioned for payment, and the endorsers deny that due notice of demand and non-payment was given to them, or either of them.

Upon the trial, a notarial certificate was given in evidence, which stated that the note was presented to the paying teller of the Hanover Bank, and payment of it demanded, on the third of August, 1853, and that payment of it was refused; also, that notices of the protest were given to the endorsers, by duly depositing the same in the general post-office in New York, addressed to the parties respectively, at Janesville, in Wisconsin, as directed by the holder.

This certificate was objected to as incompetent evidence, upon the grounds that the answer, which was verified, denied that due notice of demand and non-payment of the note had been given to the endorsers, or to either of them, and that the notary must be called to prove the facts, necessary to establish protest and notice.

The plaintiff, having rested, upon producing this document, the counsel of the defendants moved for a nonsuit, on the grounds:—

First. That the instrument given in evidence was not a promissory note, but an agreement, on the part of the company, to pay the difference between what the bonds might bring on a sale and \$5,000, should the proceeds of such sale be less than that sum, and the expenses of the sale; and that the defendants, Smith and Doe, were not liable thereon.

Second. That if such instrument were a promissory note, then it was the duty of the holder to have sold the bonds, and applied the proceeds in payment of the note, and until such sale and ascertainment of the deficiency, the defendants, Smith and Doe, could not be liable.

Third. That the facts stated in the notarial certificate were not sufficient to fix the said Smith and Doe as endorsers.

The Judge denied the motion, and exceptions were duly taken.

The plaintiff was then further allowed to prove, and did prove, that Janesville, Wisconsin, was the place of residence of Smith and Doe.

The counsel of the defendants offered to prove that the bonds mentioned in the instrument could have been sold in the city of

Arnold v. Rock River Valley Union R. R. Co.

New York, and were worth, at its maturity, a larger amount than the sum mentioned, and all expenses and interest.

The Judge excluded such evidence, and an exception was taken.

An application to amend the answer, by alleging in it such matters, so as to remove one objection taken to the evidence, viz., that no such facts were stated in the answer, was also denied, and the refusal excepted to.

A verdict was then taken for the plaintiff for \$5,570.27, the amount of the note and interest, on which judgment was entered.

The defendants appealed from the judgment.

J. E. Develin, for appellants.

H. E. Mather, for respondent.

BY THE COURT. BOSWORTH, J.—The objection, that the certificate of the notary could not be admitted as evidence, is untenable. To exclude it, the statute requires the defendant "to annex to his plea an affidavit, denying the fact, of having received notice of non-acceptance, or of non-payment, of any such note or bill." (2 R. S. 2d edit. 212, § 46.) The defendant insists, that the answer, in substance, contained such a denial; and that the answer, being verified, it was as effective, as a distinct affidavit annexed to it, to deprive the plaintiff of all right to read the certificate. To this there are two answers:—

First. The answer denies "that due notice of such demand and non-payment was given to them, or either of them," (the endorsers.)

It does not, as the statute requires, deny that notice was "received." An affidavit, in the words of this part of the answer, would not preclude the certificate from being read as evidence.

Second. The court has no right to interpolate words into the statute. The statute was not designed to affect the rules of pleading, nor to make a plea or answer perform any new office. An answer, merely denying that a notice was received, would deny an immaterial fact, and one not averred. If it did not deny that due notice had been given, the plaintiff would be entitled to judgment on the answer, if his right to recover depended, according to the pleadings, solely on the question, whether due notice had been given to the endorsers.

It cannot affect a plaintiff's right to recover, that the endorser never received notice of protest, if it is proved or is admitted to have been served, in time, and in a proper manner.

An answer can contain, only a general or specific denial of each material allegation of the complaint controverted by the defendant, or a statement of new matter constituting a defence or counter claim. (Code, § 149.)

A denial, of having received notice of protest, is not a denial of any allegation of the complaint; nor is it a statement of any new matter, constituting a defence or counter claim.

A party can make such an affidavit as the statute requires, provided no notice has been received. Whether it has, or has not been received, is known to the endorser personally. When an endorser has not actually received notice, he has a right to infer that none has been given. He may well be supposed to be ignorant of the name of the witness who will be called, or of the particular evidence that will be attempted to be given, to prove notice.

If a notice has been actually received, he must know when it was served, if the service was personal. If it was served by mailing it, the post-mark will show the time of service. In the latter case, he can prepare for the trial of the question of due notice.

If he has not, in fact, received any notice, he will labor under a disadvantage, in preparing for the trial. The statute makes it incumbent upon him, in order to deprive a plaintiff of the right to use a notary's certificate, to annex to his plea, or answer, an affidavit, denying the fact of having received notice. To hold, that he may work the same result by other means, is to modify the statute, and make pleadings perform an office not known prior to the Code, and, impliedly, if not, expressly, prohibited by the Code itself.

The objection, that the instrument, sued upon, is not a negotiable promissory note, is deserving of more consideration.

We do not think there is any thing in the objection, that it is, in effect, a contract to pay the difference, between the amount of the proceeds of the bonds, after a sale thereof, and the amount of the note. The holder is not, by its terms or legal effect, precluded from suing upon it, until after the bonds shall have been sold. When the day of payment had passed, his right of action was

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perfect, and a recovery might be had against all the parties, for the whole amount, if there was no objection to a recovery, except the one, that the bonds had not been sold.

The only important question, is this: Is an entire contract, part of which is, in form, a good promissory note, but which also contains a special contract, in relation to the money promised to be paid, a good promissory note, negotiable by statute, as to so much of the contract as is, in form, a promissory note?

By this instrument, ten bonds are pledged, as security for the payment of the \$5,000. By it, Elisha Peck is made a trustee, to hold and sell the bonds, and apply the proceeds. The mode of sale is agreed upon; and, on pursuing the mode specified, the maker agrees, to pay the balance that may remain, after applying the proceeds in satisfaction of all expenses of the sale, and in reduction of the principal and interest due thereon. See *Allen v. Dykers & Alstyme*, (3d Hill, 598.)

The terms of this contract do not modify that part which contains a promise to pay, absolutely, to the order of the persons named in it, a sum certain, and on the day specified.

The only objection is, that it contains a contract, collateral to the promise to pay the \$5,000, by which the maker of the paper may be subjected to a liability, which the law would not impose, upon the mere fact, of a deposit of the bonds as collateral security, without any special agreement as to the manner of selling them.

It will hardly be pretended, that, in the absence of any special agreement, the pledgee of stocks, deposited as security for the payment of a note of the pledgor, discounted by him, could sell, in the manner, and upon the notice, specified in this contract, and apply the proceeds, first, to pay all expenses of such a sale, and the residue on account of the principal and interest, and then, as a matter of course, recover the balance due on the note. The pledgor of the stocks would not be concluded by a sale, made in such a manner, and on such a notice, in the absence of any special contract in relation to it.

It cannot properly be said, therefore, in this case, as was said in *Wise v. Charlton*, (4 Ad. & E. 786,) that the instrument recites, or contains nothing, except what the law would imply. In that case, the note merely recited the fact that title deeds had been deposited as security.

The essentials of a negotiable promissory note, as stated in elementary books and in adjudged cases, are, that it must be payable at all events, not dependent on any contingency, nor payable out of a particular fund; and that it must be for the payment of money only, and not for the performance of any other thing, or in the alternative. (*Cook v. Satterlee*, 6 Cowen, 108.)

In *Bolton v. Dugdale*, (4 Barn. & Ad. 617,) the instrument was, in form, a promissory note, as to a promise to pay £80 and interest. By it, the maker also promised to pay a sum, which was uncertain, to a third person, in part of interest, and "the remaining stock and interest," or the balance, on demand. This was held not to be a promissory note. The sum payable to the third person being uncertain, left the sum, payable to the payee, uncertain. That case, therefore, does not touch the proposition, that a note ceases to be negotiable, because it contains a collateral contract, in no way modifying the terms, or legal effect, of that part, which, by itself, is a promissory note.

In *Davies v. Wilkinson*, (10 Ad. & E. 98,) the instrument contained a promise to pay to Charles Davies or order £695, in four instalments, one of £200, and two £150 each, and one of a £100, at times specified, and the remaining £95 was to go as a set-off against certain matters specified. The court held it, in form, a promissory note, as to the sum of £600.

Lord Denman said, "It is a note, up to a certain point, but it ends, '£95 to go as a set-off for an order of Mr. Reynolds to Mr. Thompson, and the remainder of his debt, owing from C. Davies to him.' I think that takes from it the character of a promissory note, and makes it an agreement."

Littledale, J.—"To be a promissory note, the writing should be one entire instrument. Here the instrument, as to £95, is not a promissory note."

Patteson, J.—"This is an instrument to pay £695, in the whole, by the means stated. The £95 was not to be paid to Davies, and could not be payable to his endorsee: the instrument, therefore, was not a promissory note."

There may be said to be this difference between that case and the present. In that case, the whole sum promised to be paid, was not payable to the payee named in it, or to his order, or to bearer. Part of an entire sum promised to be paid, was not pay-

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able in money, nor to the person to whose order the residue was made payable. In this case, the whole sum is payable in money absolutely, and to the order of two of the defendants.

In *Storm v. Sterling*, (28 E. L. & E. R. 108,) the question was raised upon an instrument, in terms, very much like those of the one now under consideration. The court, after stating the arguments for and against the proposition, that the instrument was a promissory note, forebore to decide the question. It is, probably, a just inference, that the court was not willing to express an opinion that the instrument was clearly a promissory note, unaffected as such, by the collateral, or additional contract which it contained. Some of the remarks of Lord Campbell, however, indicate that he inclined to that view of its character.

In *Willoughby v. Comstock*, (3 Hill, 389,) an action was brought by an endorsee of an instrument very similar to the one in question, but less special in its provisions, against the maker, and a recovery was had; but the point, that it was not negotiable, was not taken.

In the present case, the collateral, or additional contract, which the instrument embodies, relates solely to the money promised to be paid. It provides a security for the payment of the money, prescribes the mode of converting the security, how the proceeds shall be applied, and the extent of the maker's liability under the collateral contract, after the security shall have been exhausted in the manner stipulated.

If this collateral contract had been written on a separate instrument, although executed and delivered coterminously with the note, the fact of its having been so made, would not affect the negotiable character of the note itself. The pledge, or collateral security for the payment of the note, would in equity belong to every successive *bond fide* holder of the note for value. Although, therefore, the endorsement of the note would not, in law, transfer any title or right to the security created by the collateral contract, yet, in equity, it would work such a transfer. As this collateral, or additional contract, does not, in any respect, modify any clause of the note itself, nor affect in any manner the liability of any party to it, as such party, (unless it deprives the note of its negotiable character as such, which is the point to be determined,) we do not see that any injurious consequences can result, from hold-

ing, that the note, notwithstanding the addition of such contract, continues as to its negotiability, unaffected by it.

Such an instrument is quite different from one which, in addition to a note perfect in form, should contain a contract having no relation to the money promised to be paid, and wholly independent of it. If the additional contract was for the sale or leasing of land, or the sale or exchange of personal property, or related to any other distinct and independent subject, there would be many reasons for declaring the instrument not negotiable, which can have no application to that under consideration.

Instruments like the present, are of common use. The persons endorsing them, undoubtedly intend to stand in the position, and to incur the liabilities of endorsers of commercial paper, and if charged at all, to be charged by the means by which the liability of all endorsers becomes fixed. Allowing an instrument, like that in suit, to be treated and enforced as a negotiable note, cannot be made a precedent for holding instruments negotiable, which, in addition to containing a promise for the absolute payment of money, contain promises for the performance of other acts, having no reference to, or connection with, the money promised to be paid.

We are of the opinion, that the plaintiff is entitled to enter a judgment on his verdict.

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BROOKS, Respondent, v. CHRISTOPHER, impleaded, &c., Appellant.

Where a promissory note was given by an under-tenant for rent payable in advance, and came in due course of business to the hands of the plaintiff, for value, a dispossession of such under-tenant by the superior landlord, for the non-payment to him of the rent afterwards becoming due to him by his immediate lessee, is no defence to the plaintiff's action on the note.

Quere, Whether, where such dispossession took place after the under-tenant had himself made default, by not paying his note, the eviction would have constituted any defence to an action on the note by the lessee himself? It seems not.

The court will not reverse a judgment on the report of a referee, upon an alleged erroneous finding of the facts, unless such finding be so clearly against evidence, or without evidence, as to create a reasonable apprehension of his bias, partiality, or mistake.

It is not enough that the court see such reason to doubt the correctness of the finding, that they would have sustained the report if the referee had come to the opposite conclusion, or that the court think they should, upon the evidence, have found otherwise than he has done.

Where, on the trial, a referee received evidence of the declarations of a third party, but with a proviso that such evidence should be struck out, if the defendant did not supply other proposed evidence bringing such declarations home to the plaintiff, by showing his assent thereto, or adoption thereof, and afterwards the referee, for the want of such supplemental evidence, struck out such declarations, and so reported.

The court would not interfere with the report, unless the defendant excepted to such provisional reception of the evidence, or, at the close of the case, obtained a specific ruling thereon, and then excepted.

(Before BOSWORTH and WOODRUFF, J.J.)

January, 1856.

APPEAL from a judgment on the report of a referee.

The facts, and the questions argued, are fully stated in the opinion of the court.

R. M. Harrington, for the appellant, defendants.

S. P. Nash, for the respondent, plaintiff.

BY THE COURT. WOODRUFF, J.—This action is brought by the plaintiffs to recover the amount of a promissory note made by

the appellant, and by the payee therein named, endorsed to one T. B. Clark, for the rent of certain premises leased by the latter to such maker and payee, jointly, and payable on the 4th day of May, 1854, (*i. e.*, fourteen months after the date thereof, March 1st, 1853.)

The premises, so leased, were held by the said T. B. Clark, under a lease from the owners of the premises. And in the lease from T. B. Clark, to the defendants, he covenanted, that, "on paying the rent reserved, (and for a part of which the said note was given,) they should quietly enjoy the premises during the term of his demise."

The answer of the defendants avers, that the plaintiff is not the owner of the note, but that the same is the property of the said T. B. Clark. It states the demise by Clark, and avers that, by reason of his (Clark's) non-payment of his rent, to the superior landlord, the defendants were ejected from the premises, whereby the consideration of the said note has wholly, or partially, failed.

The referee reports, and so was the uncontradicted evidence, that the dispossession, by the superior landlord, did not take place until the 19th of May, 1854, fifteen days after the maturity of the note; and the documentary evidence, produced by the defendants, showed, that the summons, in the proceedings taken for that purpose, by the owner of the premises, was issued on the 10th of May, six days after the maturity of this note. The defendants were then in default, by the non-payment of their own rent, for which this note was given.

If, therefore, this was a controversy between T. B. Clark and the defendants, it would be difficult for them to charge upon him a violation of his covenant, for quiet enjoyment, when they had not, themselves, performed the very condition, upon which that covenant, by its terms, depended. He might say to them, and *non constat*, but he would truthfully say to them: "Had you paid the rent reserved to me, I should have paid the ground-rent to the superior landlord, and so have protected you, in the peaceable and quiet enjoyment of the premises." The covenant, for quiet enjoyment, &c., was not, in fact, broken, until that enjoyment was disturbed—*i. e.*, until the actual dispossession.

But, without resting the decision upon this view of the subject alone, and without inquiring how far the decision in *Giles v. Com-*

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stock (4 Comst. 270)—that an eviction, after rent has become payable, is no defence to an action upon a covenant for the payment of the rent—would prevent the tenant from setting up such an eviction, as a failure of the consideration of a note, given for the rent of a term not then expired, this case must, I think, be disposed of, upon the ground upon which the referee has apparently placed his decision. He has found, distinctly, that the note came into the hands of the plaintiff, in due course of business, before the maturity thereof, and for a valuable consideration. And, inasmuch as the alleged eviction took place after the maturity of the note, it necessarily so came to his hands (if the finding is correct) without notice of the alleged failure of consideration. It is unnecessary to do more than state, that unless this statement of the plaintiff's title was found, by the referee, without evidence, or against evidence, the plaintiff was entitled to judgment, whether the consideration of the note had or had not failed.

There was undoubtedly evidence, on the part of the defendant, warranting a suspicion that one P. I. Clark, the brother of T. B. Clark, had the control of the note, and that the plaintiff was willing to accede to any arrangement by way of deduction from the amount of the note to which the Clarks would agree; and there was evidence that indicated that P. I. Clark was active in causing the note to be put in suit, and even that the plaintiff, when applied to, after the suit was commenced, appeared not to know any thing about this note. Indeed, had the referee found, upon the whole evidence, that P. I. Clark, and not the plaintiff, was the real owner of the note, I think his finding must have been sustained; it by no means follows that his present finding should be set aside. The proof showed that the plaintiff is a brother-in-law of the Clarks; that he was on terms of confidence and intimacy with them; that he had endorsed for them to a very large amount; that this very note had been endorsed by him, and, with such endorsement, had been discounted by a bank in Middletown; and that he, as endorser, had to take it up. This clearly constituted him the owner of the note for value, succeeding directly to the rights of the bank which had discounted it before its maturity.

It was not very remarkable that he should have been willing to yield to any arrangement that was just as between the defendant

and the Clarks, not only because of his relationship to them, but because there was some evidence that he had security. But these expressions of willingness did not necessarily indicate that he intended to abate any thing from his claim on the note; they are rather the expression of his sense of what it would be just for the Clarks to do, and are not inconsistent with the expectation, that if they allowed any thing to the defendant, it would be by aiding in the payment of the note, or procuring such a deduction by a just arrangement with himself also.

Under such circumstances, and with the distinct fact before us that the plaintiff, as endorser, had been required to take up this note, and had thereby acquired the title for value, we cannot say that the finding of the referee is without evidence, or that it is so against evidence as to indicate bias, partiality, palpable mistake, or other error on his part, which furnishes ground for a reversal.

The defendant, however, complains that the declarations of T. B. Clark, when offered in evidence by him, were admitted, "subject to be stricken out if no evidence should be introduced to show their adoption by the plaintiff," and that the referee did reject this evidence when making up his report.

It must suffice to say, on this subject,—

First. That the evidence was properly rejected by the referee. The declarations of T. B. Clark, in the absence of the plaintiff, and at no time assented to by the plaintiff, were not competent evidence to impeach the plaintiff's title, nor, indeed, to affect his right to recover on any ground.

Second. There is no exception to this rejection of this evidence, and the defendant may, upon the papers, be taken to have acquiesced in it, and,—

Third. If the defendant chose to acquiesce in such a provisional admission of evidence, he should (if he wished to make it the subject of exception) have obtained a specific ruling thereon, when the case was closed, and had his exception noted.

The ruling, therefore, being in itself correct, there is in this no ground for interfering with the report of the referee.

The judgment must be affirmed, with costs.

BROWN & FIELD, Assignees of RYCKMAN, v. WILMERDING.

A purchase of property, at an auction sale, made by the owner of it, at his residence, is not necessarily fraudulent and void, as against a subsequent *bond fide* purchaser of such property from the same owner, while it continues in his actual possession, merely because the first purchaser did not take an immediate delivery of it, and retain a continued and actual change of possession.

The question, in such a case, is one of actual intent. And if a jury find, upon sufficient evidence, that the first sale and purchase were made in good faith, and without any intent to hinder, delay, or defraud the creditors of the vendor, or those subsequently purchasing from him, the verdict will not be disturbed.

(Before Boeworth and Woodruff, J.J.)

January, 1856.

THIS action came before the court, on a motion by the defendant, for a new trial. It was brought to recover the value of a billiard-table and two chandeliers. The plaintiffs claimed title, under an assignment, made to them, on the 28th of November, by Garrett W. Ryckman, Jr., of all his property, in trust, for the benefit of his creditors.

The property in question was originally owned by one Edward H. Hudson. On the 12th of May, 1853, there was an auction sale at the house of Hudson, No. 107 West Fourteenth street, of all his household furniture. At such sale, the billiard-table was bought by Ryckman, at \$290, and the chandeliers, at \$30 each, they being in the house, and sold with the furniture. They were purchased to be removed to Otsego county, and put up in the Cooper House, which was kept by the plaintiffs. Hudson consented that the articles might remain at 107 West Fourteenth street for two weeks. Within that time, Ryckman called to get them, and also soon thereafter, when Hudson made the excuse that he was busy, and could not then give the time to have them taken down.

About the 25th of May, 1853, Hudson sold this house, to one Gould, and, on the 26th, also sold him the billiard-table and chandeliers.

In June, 1853, Mr. Gould sold them to Mr. Wilmerding, the defendant. The plaintiffs, after the assignment by Ryckman,

ascertained that these articles were in the possession of the defendant. They demanded them, of the defendant, on the 9th of September, 1854. The defendant refused to deliver them to the plaintiffs, alleging that he had bought them of Charles Gould, for a valuable consideration, and without notice. Thereupon this action was brought. It was tried before Mr. Justice Slosson, and a jury, in March, 1855.

Some other facts are stated in the opinion of the court.

The Judge charged the jury, that the sale to Ryckman, not having been accompanied by any delivery, was, presumptively, fraudulent, as against subsequent purchasers, and that the plaintiffs were bound to show, affirmatively, that the property had not been left with Hudson with a fraudulent intent against purchasers; that if the jury were satisfied, upon the evidence, that there was no such fraudulent intent, they should find a verdict for the plaintiffs; that Ryckman had a right to leave the property with Hudson, unless he did so with a fraudulent intent.

The defendant's counsel excepted to the two last propositions.

The presiding Judge further charged, that the question for the jury to determine was this: Was the sale made in good faith, and without any intent to defraud creditors or subsequent purchasers?

The defendant's counsel thereupon requested the presiding Judge to charge the jury as follows:—

1st. That where one, of two innocent persons, must suffer, by the fraudulent acts of a third, that one should bear the loss, whose acts, or omissions, have enabled such third person to defraud the other.

2d. That if, after the said sale, Ryckman permitted Hudson to have the apparent ownership, and right of disposing of the said property, the jury, under all the circumstances of the case, would be warranted in believing, that Hudson was enabled to effect the subsequent sale to Gould, by the acts and omissions of said Ryckman, and, in such case, to find a verdict for the defendant.

3d. If the jury believe that the property was purchased from Hudson by Gould, for a valuable consideration, in the usual course of trade, without notice of any adverse claim, or of any circumstance which might lead a prudent man to suspect such adverse claim; and that Ryckman, by his own direct voluntary act, conferred upon Hudson the apparent ownership of the property, the

title of Gould, and of the defendant, claiming under him, should be protected, and a verdict rendered for the defendant.

The presiding Judge thereupon said to the jury, that if the plaintiffs had satisfied them, that the sale to Ryckman, which was, presumptively, fraudulent, was made in good faith, and without any intention to defraud creditors or subsequent purchasers, the plaintiffs were entitled to a verdict; and the Judge refused to charge as requested by the defendant's counsel, except as before charged, and the defendant's counsel excepted to his refusal so to charge.

The jury found a verdict for the plaintiffs, for three hundred and fifty dollars damages.

H. Nicoll, for the defendant, made and argued the following points, in support of a motion for a new trial.

I. The evidence of the case conclusively establishes, that both Gould and the defendant were *bond fide* purchasers of the chattels in question, without notice of any claim to the same, on the part of Ryckman.

II. The sale to Ryckman was unaccompanied by any delivery, nor was there any indication of a change in the ownership of the property. The billiard-table and gas-chandeliers remained as they had been put up in the house of Hudson, who continued to have the same apparent power of disposing of them as he had before enjoyed.

III. No sufficient reason was given, for dispensing with an immediate delivery of the property. The articles were capable of being removed, without delay. Under these circumstances, the continuance of the possession, in the vendor, would have been held, prior to the revision of the laws, conclusively fraudulent, as against a *bond fide* purchaser. (*Jennings v. Carter*, 2 Wend. 446.)

IV. The question of fraudulent intent, within the meaning of the Revised Statutes, is not limited to an actual mental or moral intent to commit a wrong. Its existence may be established, without the presence of crime or turpitude, in all these cases, where a party must be held to intend, the necessary or natural consequences of his own acts. In passing upon the question, as one of fact, the jury are bound, in a proper case, to determine the intent, without reference to the motives of the parties to the transaction. In this

respect, the law has not been altered, except in transferring the decision of the question from the court to the jury. (*Griswold v. Sheldon*, 4 Comstock, 581; Story's Eq. Juris., vol. 1, §§ 185, 258, 349.)

V. The present case was submitted to the jury as a question, simply, of mental fraud; the charge of the presiding Judge evidently tended to create an impression, with the jury, that they were only to pass upon the question as one of an actual mental intent to commit a fraud.

VI. The presiding Judge also erred in charging the jury, that if they were satisfied the property had not been left with Hudson with a fraudulent intent, they should find a verdict for the plaintiffs; and that Ryckman had a right to leave the property with Hudson, unless he did so with a fraudulent intent. These remarks were calculated to divert the attention of the jury from the real question at issue.

VII. The refusal of the Judge to charge the several propositions presented on the part of the defendant, was erroneous.

1. The evidence in the case fully authorized their being submitted for the consideration of the jury; they were obviously relevant and had a direct bearing upon the question of fraudulent intent.

2. An unqualified refusal to submit them to the jury was in effect instructing them that such considerations had nothing to do with the case, and was, in fact, confining the jury to the simple question of moral or mental fraud.

3. The defendant had a right to have the said propositions submitted, on the ground that the jury might find that the acts of Ryckman operated as an *estoppel in pais*, irrespective of any question of fraudulent intent. (*Pickering v. Busk*, 15 East. 44; *Lingham v. Biggs*, 1 Bos. & Pul. 82; *Gregg v. Wells*, 10 Adolph. & Ellis, 90; *Stephens v. Baird*, 9 Cow. 274; *Thompson v. Blanchard*, 4 Comstock, 303; *White v. Springfield Bank*, 8 Sand. S. C. 223; *Fatman v. Loback*, 1 Duer, 354; *Carpenter v. Stilwell*, 12 Barb. 128; *Saltus v. Everett*, 20 Wend. 267.)

VIII.—The verdict was against the evidence, and a new trial should be granted on that ground.

D. B. Eaton, contra.

BY THE COURT. BOSWORTH, J.—The property in question, and other property, was bought by Ryckman on the 12th of May, 1853, at an auction sale of the household furniture of Hudson, which took place at the residence of the latter, in New York city. The aggregate amount of Ryckman's purchases was about \$2,000. This was paid, and all the property was delivered at the time, except that in question.

In November, 1853, Ryckman assigned all his property to the plaintiffs for the benefit of creditors.

On the 25th of May, 1853, Hudson, having the actual possession of the property in question, sold it to Charles Gould, and the latter sold it to defendant, in June, 1853. Gould and the defendant were, severally, *bonâ fide* purchasers for value.

The plaintiffs, finding the property in the possession of the defendant, made a demand on the 9th of September, 1854, for a delivery of it, and that being refused, they brought this action to recover its value.

The defendant insists, that the sale to Ryckman was fraudulent and void, as against himself and Gould as subsequent purchasers.

That was the question to be determined at the trial. The jury have found that the sale was made in good faith, and without any intent to defraud creditors.

There is no ground, upon the evidence, for pretending, that either Ryckman, Gould, or the defendant, was not a purchaser for value, believing that he acquired title, nor that either did not buy intending to take, and retain possession, as such purchaser.

The sale to Ryckman was by one having authority to make it, and as between the former and Hudson, passed the title. If this property had been removed by Ryckman, with that bought at the same time, no question like that now presented could have arisen.

Ryckman, designing to place the property in a public house, which he was erecting at Cooperstown, obtained permission of Hudson to let it remain in his house between two and three weeks. Within that time, he called for the property, and Hudson said he was busy, and could not have the billiard-table taken down then.

This property, never having been delivered to Ryckman, the statute makes the fact, that there was not an immediate delivery

followed by an actual and continued change of possession, unless such an explanation of it, as the statute prescribes, is given, conclusive evidence, that it was fraudulent and void, as against the defendant.

This threw on the plaintiff the burden of proving, that the sale was made in good faith, and without any intent to defraud the creditors of Hudson, or persons subsequently purchasing from him.

The plaintiffs gave evidence, tending to establish that the sale was so made, and that all reasonable efforts were made, within two weeks after the sale, to obtain possession of the property, with a view to remove it to Cooperstown. The sale was not absolutely fraudulent and void as to subsequent purchasers, because the property was not immediately removed.

The reasons why an immediate delivery and removal of the property was not had, were to be weighed by the jury, in determining the questions which they were to decide.

The court instructed the jury, that the sale was presumptively fraudulent; that the burden of proof was cast upon the plaintiff, to show affirmatively, that the sale was made in good faith, and without any intent to defraud creditors, or subsequent purchasers. That if they found these facts in favor of the plaintiffs, they were entitled to a verdict.

We think this charge presented to the jury the true questions to be determined by them.

The first request to charge, made by the defendant, the Judge properly disregarded.

There is nothing in the evidence given laying a foundation for such an instruction to the jury. If the billiard-table had been left in the possession of a vendor, who was engaged in the business of selling such articles, and at the place where his business was transacted, and the defendant, or Gould, had purchased it there, the instruction asked might have been a proper one. But the acts or omissions of Ryckman, in not immediately removing, and retaining an actual and continued change of the possession of the property, no more enabled Hudson to commit a fraud on third persons, than lending the same property to him would have done.

Allowing a person to have actual possession of chattels, unless there is some other fact connected with it, is not an act which holds him out to the public as owner, or as authorized to sell it as

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his own. The doctrine of *caveat emptor*, as to any title the purchaser may acquire, applies. The mere fact that it was bought from one in possession of it, does not preclude the true owner from asserting his title.

These views, if correct, show that the Judge at the trial did not err in refusing to charge in the terms of the second request.

There is no ground for pretending that Ryckman permitted Hudson to have the apparent right of disposing of the property, unless naked possession created, apparently, such a right.

All that the Judge could properly be required to say, with respect to the matter of such request, was covered by the propositions which he submitted to the jury.

It is not necessary to say any thing further, by way of illustrating the proposition, that it was not erroneous to refuse to charge in the terms of the third request.

The action was submitted to the jury, under proper instructions from the Judge, and the order denying a motion for a new trial must be affirmed.

BENEDICT v. CAFFE & CUTTER, D. T. YOUNGS, and ESTHER ANN CATLETT, Executrix of HENRY LAVERTY, deceased.

When the maker of a note, payable at no place named, at the time of making it, has a known place of business, but, before its maturity, fails and makes a general assignment of all his property to one of the endorsers, for the benefit of creditors, and the assignee transacts his business of assignee at such place, that fact alone, will not make a presentment of the note, and a demand of its payment at that place, sufficient to charge the endorsers. 2. If it has ceased to be the maker's place of business, a demand must be made of him personally, or at his place of residence. 3. When neither has been done, the question becomes one of due diligence to find the maker, or his place of residence.

In an action against the endorser of a note, endorsed for the accommodation of the maker, when the defence is, that it was usuriously discounted at its first inception, the purchaser, having bought it from a third person, after it was so endorsed, may show that the seller, by authority of the endorser, represented it to be business paper, and that it was purchased, relying on the truth of such representations.

And, in such a case, a plaintiff may give in evidence papers, executed by the endorser, and delivered to the seller, as evidence of his authority to so

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represent, and the declarations, accompanying such delivery, averring such a purpose, although the papers, by these terms, may not be evidence of such a fact. Especially may this be done, when the terms of the paper are not necessarily inconsistent with the truth of such accompanying declarations, although the paper is dated, and was delivered, after the note was sold, and the representations were made, on the faith of which the note was bought.

(Before BOSWORTH, HOFFMAN and WOODRUFF, J.J.)

January, 1856.

THIS action was brought against the defendants, upon a note, which, with its endorsements, reads as follows, viz. :—

\$1,484.

NEW YORK, 3d August, 1853.

Four months after date, we promise to pay, to the order of D. T. Youngs, fourteen hundred and eighty-four dollars—value received.

(Signed) CAFFÉ & CUTTER.

(Endorsed) { DANIEL T. YOUNGS,
HENRY LAVERTY.

Laverty having died after the action was brought, Esther Ann Catlett, his executrix, was made a defendant. The action was tried before Mr. Justice Slosson, and a jury, in June, 1854, and the plaintiff recovered a verdict against Caffé & Cutter, for \$1,540.82, and against Youngs and the executrix of Laverty, for \$1,453.78.

The defendants, Youngs and Catlett, moved for a new trial, on the ground, that the verdict was against evidence, as well as on account of exceptions to the ruling of the Judge, which motion was denied. A judgment having been entered on the verdict, the defendants, Youngs and Catlett, appealed to the General Term, from the judgment, and from the order, denying a new trial.

When the note in question was made, Caffé & Cutter did business, as partners, at 18 John street, in the city of New York, and had, for several years prior thereto. On the 3d of October, 1853, they failed in business, and made a general assignment of their property, for the benefit of their creditors, to the defendant Youngs. The case did not disclose the terms of the assignment. Youngs transacted the business, of assignee, at the assignors' former place of business, 18 John street. P. Caffé, one of the firm, continued to resort to this place, for some three or four weeks after the failure. When the note matured, it was presented to some one, but to whom, did not distinctly appear, at 18 John street, for payment,

and, not being paid, it was protested, and notice thereof was given to the endorsers. No other effort was made to find the makers, or whether they had a place or residence in the city. The question was raised, whether this was a sufficient presentment. The Judge charged, that the presentment and demand were sufficient. The charge of the Judge, and requests made of him to charge in relation thereto, and his refusal to charge as requested, and the exceptions taken, are fully stated in the opinion of the court.

Another ground of defence was, that each endorser endorsed the note for the accommodation of the makers, and, when first negotiated, it was sold to the plaintiff, by Dore & Robinson, brokers, acting on account of the makers, at a discount exceeding the rate of seven per cent. per annum.

It appeared, that Youngs & Lavery had endorsed largely, for the accommodation of Caffa & Cutter, for several years, prior to the date of the note in suit, and that the note in suit was so endorsed by them.

The note was placed, by Michael Caffa, a clerk of Caffa & Cutter, in the hands of Dore & Robinson, to be negotiated by them, for the benefit of the makers, and they sold it to the plaintiff, on the 15th of August, 1853, for \$1,384.

The plaintiff attempted to prove, that Dore, who conducted the negotiation, represented the note to be business paper, and was authorized by Lavery to so represent, and that he bought the note, relying on the truth of these representations.

The material evidence, on that point, is stated in the opinion of the court.

The plaintiff put in evidence, a paper, signed by Lavery, in these words, viz. :—

This is to certify, that my endorsement on the notes of Messrs. Caffa & Cutter, in favor of Mr. Daniel T. Youngs, is for a valuable consideration.

(Signed) HENRY LAVERTY.

New York, 18th August, 1853.

Witness, (Signed) E. R. KNAPP.

He proved, that it was in the possession of Dore, at or about the time of its date, and so continued, until the 26th of Sept., 1853, when it was destroyed at Lavery's request, but not until after he

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had executed and delivered, to Mr. Dore, a paper of the latter date, of which the following is a copy, viz :—

Caffé & Cutter, note ac. Dan'l T. Youngs, endorsed

Hy. Lavery, due	2-5 Oct.,	\$1,000 00
Do. do. do.	4-7 Oct.,	1,498 40
Do. do. do.	12 Nov.,	1,206 00
Do. do. do.	18-22 Nov.,	1,484 50
Do. do. do.	3-6 Dec.,	1,484 00
Do. do. do.	16 Nov.,	1,872 80
Do. do. do.	7-10 Nov.,	630 50
Do. do. do.	18-16 Dec.,	942 64
Do. do. do.	20 Dec.,	1,232 00
Henry Lavery, note ac. Caffé & Cutter,	21 Nov.,	1,080 00

\$11,930 84

This is to certify, that my endorsements on the notes of Caffé & Cutter, in favor of Dl. T. Youngs, as also on my note account Caffé & Cutter, for \$1,080, sold by Dore & Robinson, are for a valuable consideration. The above statement of said notes is supposed to be correct.

(Signed) HENRY LAVERTY. [L. S.]

New York, September 26th, 1853.

Witness, JOHN S. ISAACS.

The admissibility of each paper was objected to by the counsel of the executrix. The objection was overruled, and the decision excepted to. The testimony, in relation to the circumstances under which the first paper was destroyed, and the second one given, appears in the opinion of the court.

So much of the charge, as relates to the fact of Lavery having authorized Dore to represent the paper as business paper, and the effect of such representations, if made by such authority, as it is necessary to state, was as follows:—

Did Lavery make Dore his agent in the negotiation and sale of this paper, and authorize him to represent it to the purchaser as business paper?

According to Dore's statement, he called on him in 1851, and told him that Caffé & Cutter would hand him paper, with his en-

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dorsement, for sale, and he requested Dore to use his exertions to sell it, saying it was business paper. If you believe that Lavery meant that this request, (that Dore should use his exertions to sell the paper,) was to be understood by Dore as applying to all such paper of Caffé & Cutter, with his (Lavery's) endorsement, as he, Dore, should receive for any future time, until the request should be countermanded, then this was an authority to Dore to negotiate the sale of the note in question, and Lavery would be bound by his representations, made in the course of that agency.

To this ruling, and to the submission of this question of agency, defendants' counsel excepted.

As to Youngs, there is no evidence that he ever authorized Dore & Robinson to sell this paper. He knew that they had paper of Caffé & Cutter to sell, but no agency could be created without his act.

If you shall believe the paper was accommodation paper, then (the discount at more than seven per cent. being as to such paper usury) you must find a verdict for all the defendants, unless you believe that the note was represented to be business paper by their authority, and that it was discounted by the plaintiff on the faith of such representations, and without the knowledge that it was accommodation paper. If the endorsers authorized Dore & Robinson to negotiate and sell the note, then they are bound by Dore's representations in the course of that agency; but, as I have already stated, there is no evidence to show such an authority on the part of Youngs.

To this the executrix of Lavery excepted.

If the paper was for value, then the defence for usury fails; or, if the paper was accommodation paper, and Lavery authorized Dore & Robinson to sell it, then, being bound by his representations, the defence of usury fails, as to Lavery.

To this defendants excepted.

As against the endorsers, the plaintiff can only recover the amount he actually paid, but against Caffé & Cutter the whole amount of the note.

The jury found a verdict in favor of the plaintiff, against the defendants, Caffé & Cutter, for \$1,540.82, and against the defendants, Young and the Executrix, \$1,453.78.

W. Bliss, for defendant Catlett.

John A. Bryan, for defendant Youngs.

J. Larocque, for plaintiff.

BY THE COURT. BOSWORTH, J.—Is the charge of the Judge, that No. 18 John street was a proper place to present the note for payment, correct? Caffé & Cutter, the makers of the note, commenced business in 1846. The note in question matured the 6th of December, 1853. On the 3d of October, 1853, the makers failed in business, and made a general assignment of their property for the benefit of their creditors, to the defendant Youngs. The sign on the outside of the building was not removed. Their office, or the rooms in which the firm had done its business, was on the second floor of the buildings. On the door, opening from the hall into their place of business, there had been a sign, bearing the name of Caffé & Cutter. On their failure, this sign was removed, and one bearing the name of Daniel T. Youngs, assignee, was put on the door. P. Caffé, one of the firm, continued to resort to his former place of business, for three or four weeks after the failure. The testimony tends to show, that he ceased to go there, about a month before the note matured. Youngs, the assignee, occupied the rooms formerly occupied by the firm, in transacting the business devolved upon him by reason of the assignment. The Judge charged, that 18 John street, after it ceased to be the place of business of Caffé & Cutter, being adopted by the assignee as the office for the transaction of the business of the estate, was the proper place of presentment. To this charge, the counsel for the executrix of Lavery, and the counsel of the defendant, Youngs, severally excepted, and requested the Judge to charge that it was not sufficient to present it there, unless that was also the maker's place of business, and that if they had no place of business, the presentment must be at their residence, or to them personally.

The Judge refused to charge otherwise than as above stated, and the counsel of the executrix excepted, as did also the counsel of Youngs.

The charge affirms, that a presentment made at 18 John street,

was sufficient, although it may have ceased to be the maker's place of business, merely because a general assignee, of all their property for the benefit of their creditors, had adopted it as his office for the transaction of the business of the estate.

We think this ruling erroneous. Youngs was not a general agent of the makers of the note, to transact their business as such agent, at 18 John street, or elsewhere.

He had no right to use the proceeds of the assigned property to pay the debts of his assignors, except in such order of priority as the assignment prescribed. Creditors of the same class, if there was not enough to pay them in full, would be entitled to be paid *pro rata*. Youngs, as assignee, was trustee of an express trust. He was not an agent of the assignors, in any sense in which that word is employed, in treating of the relation of principal and agent, and the consequences resulting from it to the parties, or to third persons. In whatever he did, or could properly do, as assignee, he was acting as principal, no more subject to the control of the assignors, than to that of their creditors, and subject to no other actual control from either, than they could obtain by action, to compel him to perform the duties devolved on him by the assignment, or to make good any losses caused by a violation of his duty, or a failure to perform it. No authority has been cited, which sustains the decision made at the trial.

The rule seems to be settled, that even the known bankruptcy or insolvency of the acceptor of a bill, or of the maker of a note, will not excuse the failure to present it to him personally, or at his place of business or residence, for payment. Neither will they excuse the omission to give notice to the endorser. (*Chitty on Bills*, 886; 3 *Kent's Com.* 95.)

Where no presentment has been made to the maker personally, or at his residence or place of business, the inquiry generally is, whether, under the circumstances of the case, due diligence has been used, the general principle being, that due diligence must be used to find out the party, and make the demand. (3 *Kent*, 96.)

But the charge, as given, entirely withdrew that question from the consideration of the jury. We certainly cannot say that any facts were proved, which the court was authorized to hold, amounted, in judgment of law, to due diligence.

The sign of Daniel T. Youngs, assignee, on the door of the

office, or former place of business of Caffé & Cutter, was a formal notice to all persons seeking them, that it had become the place of business of another person, and had ceased to be their place of business. The firm had been in business, in this city, some seven years. There is no evidence that the slightest inquiry was made to ascertain the residence of either of the makers. On such evidence, we cannot say that due diligence was used to find the makers. The charge made being erroneous, the executrix of Laverty, and the defendant Youngs, are entitled to a new trial on that ground.

If the case had disclosed the contents of the assignment, it might have appeared to be a general assignment of all the property of the assignors to ~~Youngs~~, the first endorser, upon trusts, and among others, to first pay all notes made by the assignors, on which Youngs had been, or might be made liable as endorser. If so, the *Mechanics' Bank of New York v. Griswold*, (7 Wend. 163,) is an authority, that neither demand, nor notice, would have been necessary to charge Youngs, as endorser. But the case does not disclose the terms of the assignment made by Caffé & Cutter to Youngs.

The questions most difficult of solution, relate to the effect that the jury might properly give to the representations testified to have been made by Laverty to Dore, and to the paper which Laverty executed and delivered to Dore, in connection with the other evidence relating to the same subject matter. These questions affect only the executrix of Laverty.

We have no doubt that the note and the endorsements were without consideration, and that the note never had any legal inception, until it was negotiated to the plaintiff, on the 15th or 16th of August, 1853, at a greater discount than at the rate of seven per cent.

Independent of the effect that may be given to the paper, and to these verbal representations, and to the fact that the plaintiff may have bought the note, relying on the assurance that it was business paper, the plaintiff would have no right to recover. The note not having had any legal inception before the plaintiff bought it, and he having bought it at a discount exceeding the legal rate of interest, it would be void for usury, if there were no other evidence affecting its validity.

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It is not pretended, whatever may be the proper meaning of the paper of the 26th of September, 1853, or whatever it may be deemed to represent, that the plaintiff is in a position to claim, that he bought, relying on the truth of its statements. It was not in existence, until more than a month after the note in question was negotiated to the plaintiff. And the jury were expressly told, that if Dore was to be believed the paper of the 18th of August was not properly before them, and might be considered as out of the case. If the jury had not believed him, their verdict should have been for the defendants.

The Judge instructed the jury, "that if the endorsers authorized Dore and Robinson to negotiate and sell the note, then they are bound by Dore's representations in the course of that agency," but that there was no evidence to show such an authority on the part of Youngs. The verdict, as to him, is, therefore, clearly against evidence. Caffa & Cutter have not appealed. The views hereinafter expressed have reference solely to the executrix of Lavery.

Dore testified as follows: "Mr. Lavery called upon me, in July, 1851, stating to me that Caffa & Cutter would hand me paper for sale with his endorsement, requesting me to use my endeavors to sell it, stating that it was business paper." "I commenced negotiating notes of Caffa & Cutter, endorsed by Lavery, about three years since, in 1851." (The trial of this action commenced on the 21st of June, 1854.) "Mr. Lavery called upon me in regard to negotiating their paper in 1851. I used to see him two or three times a week. After the failure of Caffa & Cutter, Mr. Lavery wanted the paper which he had signed," (meaning the paper of the 18th of August,) "to be returned to him, which I refused. Mr. Lavery requested the first paper. I told him I could not give it up, because I held it as security for my representations."

Laying out of view, for the present, the true meaning of the paper of the 26th of September, if Dore is to be credited, it is difficult to say, that his testimony would not justify the inference, that Lavery applied to Dore as early as June, 1851, to solicit his aid in selling paper, made by Caffa & Cutter, and endorsed by himself, and assured him that it was business paper. That this assurance was given to increase his facilities for selling the paper,

and with the expectation that he would make the same assurance to those to whom he might apply to purchase it. A difficulty, that arises at the outset, is whether this statement can be seen, or is shown, to have any connection with paper made two years subsequently.

If Dore is to be credited, then there is sufficient evidence to justify a jury in believing, that Laverty knew, or supposed, before he executed the paper of the 26th of September, that Dore had represented, or assumed to have represented, on negotiating the paper of Caffa & Cutter, endorsed by himself, that it was business paper. Instead of denying his authority to have so represented, with respect to all or any of such paper, he obtained from Dore a surrender of the first paper, which, by its terms, applied to all notes made and endorsed like the one in suit, and gave in its place one, applicable to ten notes particularly described, and including the one in suit. Whatever the paper, on a strict criticism, may be thought to mean, it was desired by Dore, and may be supposed to have been given by Laverty, as a voucher or assurance that the representations which the former had made, respecting the notes it embraced, were made by his authority.

If these views are correct, then there was evidence enough to justify a submission of the question, whether Laverty intended to assure Dore, and to authorize him to assure those with whom he might negotiate, that all the notes of Caffa & Cutter, endorsed by himself, which should be handed to him, by Caffa & Cutter, to be sold, down to and including the sale of the one in suit, was business paper, and to warrant their finding that he did.

Benedict, the plaintiff, testified, that he asked Dore if it was legitimate business paper, and he said it was. Dore did not say to whom the notes belonged; that if the witness had known it was accommodation paper, he would not have taken it. This evidence, if credited, would justify the jury in finding, that Benedict bought the note, relying on the assurance that it was business paper, and by reason of the representations, to that effect, made to him by Dore.

I do not overlook the fact, that the Judge decided, while Benedict was under examination, that any statements which Dore might have made to Benedict, as to the character of the paper, were not admissible, in evidence, as against the endorers. But this decision

was made before any evidence had been given, that Dore negotiated the notes at the instance of Lavery, and was authorized by him to represent it to be business paper.

It needs no argument to show, that, when enough has been proved to entitle the plaintiff to go to the jury, upon the question whether Lavery authorized Dore to represent this note to be business paper, the plaintiff will have a right to show, if he can, that Dore did so represent, and that the plaintiff bought the note, relying upon such representation, and believing it to be true.

The paper of the 26th of September, does not import more, than that Lavery had been paid a consideration for endorsing the paper. At the same time, its terms are not inconsistent with the idea, that he had negotiated the note, for value, in the course of his business, and, in that way, had received a consideration for his endorsement. But they furnish no evidence of that fact.

Still, the circumstances under which it was executed—the conversation had, between him and Dore, at the time; the reasons assigned, by Dore, for refusing to surrender the paper, of the 18th of August, until this had been delivered to him—made this paper admissible as evidence, bearing upon the question, whether Lavery authorized, and intended to authorize, Dore to represent this to be business paper, with a view to influence third persons to buy it, relying on such representations.

Although the paper does not import, that Lavery had so negotiated the note, and, therefore, may not be so drawn as, of itself, to furnish evidence that the note was of the business character, that he had authorized Dore to represent, yet, as it was sworn to have been furnished, that Mr. Dore might be able to show that he was thus authorized, the fact, that he gave it under such circumstances, might, in the estimation of a jury, very properly be regarded as corroborating his statements, in respect to the authority originally given, and as illustrating the point, to what period, in the future, it was understood and intended that authority should continue.

If it had appeared that the plaintiff knew, when he discounted the note, that it was discounted for Caffa & Cutter, and that the money received from him was to be paid over to them, a jury might very properly find, that he did not discount it, relying on the truth of the representations made, as he would, in that case,

have had knowledge of facts, which would have been notice that it was not business paper. Having such knowledge, it might have been his duty to inquire further.

If he bought, supposing it was negotiated for, and at the instance of Lavery, and on representations made, or authorized by him, that it was business paper, then he would not be entitled to recover of the executrix, more than the sum paid for it, and interest. (*Oram v. Hendricks*, 7 Wend. 569.)

But if he bought, believing it was business paper, which had been negotiated by all the parties whose names it bore, relying upon assurances to that effect, which Lavery had authorized to be made, to enable a sale of it to be effected, it is difficult to perceive, on what ground, the executrix of Lavery can claim exemption from liability, if it shall be made to appear that enough was done to fix his liability, as endorser.

These observations sufficiently present the views, which we think should be submitted, as a guide to the jury, in respect to the questions of fact to be determined by them, on such evidence as the case, before us, presents; and the effect they would be authorized, if they credited the testimony of Dore, to give to the declarations of Lavery, made at the interview between the two, in July, 1851. They render it unnecessary to express any opinion upon various exceptions taken to portions of the charge, as a new trial must be granted, as to Youngs, as well as the executrix of Lavery, by reason of the instruction given in reference to the sufficiency of a presentment of the note, at 18 John street.

A new trial must be granted as to Youngs and Catlett.

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COE S. BUCHANAN and others v. ELSWORTH CHESEBOROUGH.

Upon the dissolution of a partnership between the plaintiffs and defendant, the former executed an instrument, (the latter not being a party,) in which the withdrawal of the latter was recited, and the plaintiffs agreed to pay him certain sums, and give him certain notes, as specified. They also stipulated to hold him harmless as to all matters of the concern, except, that as to certain items and notes then remaining unpaid to the firm, if any loss should be sustained, he, the defendant, was to share and pay to the plaintiffs seven-sixteenths thereof.

Four days afterwards, the defendant executed and delivered a receipt, acknowledging the reception of the cash and notes under the agreement signed by the plaintiffs, dated the 31st of December, 1853, that above stated.

Held, that the operation of the receipt was a recognition of the instrument signed by the plaintiffs, and made the defendant as much governed by its provisions, as if he had executed it.

At the trial, after the documents had been produced and proven, the counsel of the plaintiffs stated that the various items of their account under the stipulation, amounted to between five hundred and six hundred dollars, but offered no evidence. The court then made the direction, taking a verdict for \$750, subject to the opinion of the General Term, and in case the General Term sustained the plaintiffs' right of action, then a reference to ascertain their damages.

Held, that the course pursued at the trial was irregular. That the cause could not be tried before a jury in part, and a verdict taken, and, partly, by a referee afterwards to be appointed.

In a proper case, where the propriety of a reference was disclosed on a trial, the cause may probably be withdrawn from the jury, but should be so altogether.

(Before BOSWORTH, HOFFMAN and WOODRUFF, J.J.)

January term, 1856.

THE action was brought to recover \$527.45 and interest, being seven-sixteenths of certain losses made by a copartnership, composed of the plaintiffs and defendant, and which, it is alleged, the defendant promised, in writing, to pay, in an instrument, executed upon the dissolution of the firm. The ground of the action was, that the plaintiffs had settled with the defendant, and paid him, upon the basis of certain outstanding assets being available, under his express undertaking to pay his proportion of every eventual loss. Upon the trial, a verdict was taken in favor of the plaintiffs, subject to the opinion of the court; the case to be heard, in the first instance, at General Term, and a reference to be had, (if the

General Term affirmed the right of the plaintiffs to recover,) to ascertain the amount of their damages.

The facts are fully stated in the opinion of the court.

Sheppard, for the plaintiffs.

Brown, for defendant.

BY THE COURT. HOFFMAN, J.—The plaintiffs and the defendant were partners in trade, under the name of Buchanan, Cheseborough & Co., until the 31st of December, 1853. By the sixth item of the articles, the profits were to be shared as follows:—to Elsworth Cheseborough, the defendant, seven-sixteenths; to Buchanan and Kilmer, jointly, seven-sixteenths; and to William H. Parsons, two-sixteenths; and the responsibilities of such firm were to be shared and borne in the same proportions.

The defendant, on the 31st of December, 1853, retired from the firm, and on that day, an instrument was executed by Buchanan, Kilmer, and Parsons, some clauses of which will be hereafter stated, as upon them the case chiefly depends.

On the 4th of January, 1851, the defendant executed a receipt, in which he acknowledges the reception of certain notes of Buchanan, Parsons, and Company, and \$1,500 in cash, "the notes and cash being received under an agreement, signed by Buchanan, Kilmer, and Parsons, dated December 31, 1853, and are received by me in full discharge of so much of said agreement as relates to the giving of notes and paying of moneys."

We are clearly of opinion, that this instrument, executed by the defendant, is a recognition of the instrument of the 31st of December, and makes all his rights and all his liabilities as entirely dependent upon, and controlled by it, as if he had actually signed it.

In that instrument, the withdrawal of Cheseborough is recited, and the amount of capital he had put in, which amount, (\$965.04,) the other parties agree to pay to him for withdrawing from the firm. The instrument then proceeds:—"It is further agreed by the undersigned, that they will, on the 2d day of January next, form and advertise a copartnership, under the firm and style of Buchanan, Parsons, and Company, and the said firm shall

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liquidate all the outstanding liabilities of the present firm of Buchanan, Cheseborough & Co., and shall hold the said E. Cheseborough harmless in all matters thereto pertaining; except in such items and matters of accounts, or the notes taken in settlement therefor, for goods sold before the 1st of July last, and at this date remaining unpaid and standing upon the books of the present firm as good accounts, notes, &c. On these matters, should any loss be sustained, that the said Cheseborough is to share, and pay to the undersigned, seven-sixteenths of whatever sum said loss may amount to."

It is alleged in the complaint, and not denied, that all the notes and cash given upon this settlement to the defendant, have been fully paid.

There was here no new substantive agreement, by which Cheseborough bound himself as surety, guarantor or otherwise, of the sufficiency of outstanding claims. There was simply this case. The plaintiffs settled with him as a retiring partner, upon the basis of all the notes and demands due the firm, being good. His liability to bear seven-sixteenths of what might turn out bad, was a part of his liability as partner. That liability, which, but for the clause in question, might be considered as resigned, this clause retains, and upon making out the case provided for in the clause, not a doubt can exist, of the right of the plaintiffs to call upon him for his proportion.

The next question, therefore, is, whether the case of a liability within this clause has been established upon the pleadings and proof. The complaint, after stating the effect of the provisions in the instrument of December, 1853, avers, "that upon the books of the said copartnership, and as good accounts of the date of the said instrument, and then unpaid, and for goods sold before the said 1st of July, 1853, by the said copartnership, were divers accounts, amounting in the whole, to \$1,726.65 and upwards, which have not been paid, and in consequence of which non-payment, a loss has been sustained by the plaintiffs, amounting to \$1,205.60 and upwards, the seven-sixteenths of which the defendant is, and remains, liable to pay to the plaintiffs."

The defendant, in his answer as to the matter, says:—"That there were upon the books of the copartnership, on the said 31st of December, 1853, divers accounts for goods sold before the 1st of

July, 1853, which were, on the said 31st of December, unpaid, and then standing on such books as good accounts, but he avers, that most of such accounts have since been paid, and as to those that have not been paid, the plaintiffs have not used proper diligence to collect the same, and any loss which has been suffered from the non-payment of such accounts, has resulted from such *laches* and want of diligence."

On the trial, after the instruments were produced, and evidence was given as to the rights of the parties before stated, one witness proved that he often saw the parties together. There were various conversations respecting the accounts. Some of them were presented to the defendant, and on one occasion, he, the witness, went over the accounts with him.

The counsel of the plaintiffs then stated the various items of their accounts against the defendant, amounting to between five and six hundred dollars, and then rested.

The court directed a verdict for the plaintiffs, for \$750, subject to the opinion of the court, to be taken in the first instance at General Term, and a reference to ascertain the amount of damages, if the General Term should affirm the plaintiffs' right of recovery.

At a first examination of the Code, we might be led to suppose that this course was warranted by it. The 258d section provides, that an issue of fact in an action for the recovery of money only must be tried by a jury, unless such trial is waived as provided in section 266, or a reference be ordered, as provided in section 270 and 271. Section 271 provides, that where the parties do not consent, the court may, on the application of either, or its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference in the cases there following.

The second subdivision is, where the taking of an account shall be necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

But we do not think this, or any other section of the Code, warrants a proceeding by which a part only of the action is tried by a jury, who find a verdict, which is, after all, not merely indecisive of the case, but may turn out, upon further investigation by another body, to be wholly unauthorized. If a trial by jury is had, it must comprise every matter in issue, on the record, or none.

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Such a course was, we presume, unknown under the former system.

A reference could be ordered at the circuit, upon hearing both parties, (19 Wend. 85,) and it may well be, that under the former and present system, a cause might be commenced, and then be found so plainly one for a reference, that the court might direct it. But in such a case, the cause would be taken from the jury entirely.

When the cause is tried before the court, under the 254th section, no such difficulty exists, the court still trying the cause, whether an issue is directed, or a reference, as to any portion of the case, or a particular fact in it. It comes back to the court for ultimate decision.

We consider that the verdict should be set aside, with liberty to the plaintiffs to apply for a reference to hear and determine the whole issues in the case, and also to amend their complaint, if so advised, so as to make the ground of action an agreement and contract between them and the defendant, not simply upon the deed of December, which makes him proceed upon a covenant.

The costs of the appeal are to abide the event of the cause.

JOHN KUHLMAN v. JOHN ORSER, Sheriff.

A sheriff who, in an action for the delivery of personal property, returns that he had taken the property in question, from the defendant, and delivered it to the plaintiff, is estopped from denying the truth of the facts, that the return asserts, or necessarily implies.

He is not, therefore, permitted to allege, that the property was not in the possession of the defendant, but was in his own custody, by force of a levy under an attachment previously issued.

This return is conclusive proof that, in his own judgment, the property was not bound by the attachment, and operates to release it from any lien that a prior levy might have created.

The notice, required to be given in the execution of a warrant of attachment, under § 235 of the Code, must describe, particularly, the property levied on, so as to enable the holder to identify it, and deliver it to the sheriff, when his own claims are satisfied.

A notice referring, in general terms, to the property, as belonging to the debtor in the attachment, is insufficient and void.

As against a *bond fide* purchaser, personal property is only bound by an attachment from the time of an actual levy.

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In proceeding under an attachment, the sheriff acts as much at his own peril, as in proceeding under an execution. Hence, he renders himself liable, as a trespasser, by taking and removing the goods of a person not named as a debtor in the attachment.

(Before DUEK, CAMPBELL and HOFFMAN, J.J.)

Heard, December, 1855; decided, January, 1856.

MOTION, on the part of the plaintiff, for judgment, on a verdict in his favor, taken subject to the opinion of the court, at General Term.

The action was brought for the delivery of the possession of certain goods and merchandise, consisting of wines, Cologne water, and linen pocket-handkerchiefs, valued in the complaint at \$1,000, which the complaint alleged that the defendant had wrongfully taken, and wrongfully detained.

The answer denied the wrongful taking and detainer, and set up, as a justification, that the defendant, acting as sheriff of the city and county of New York, under two certain attachments, (of which copies were annexed to the answer,) directed to him, as such sheriff, against the property of — Pfeiffer, — Von Kamp, and one C. F. Herx, composing the firm of Pfeiffer, Von Kamp & Co., in the month of August, 1853, had attached and levied on the goods and chattels mentioned in the complaint; and averred, that the defendants in the attachment, or some, or one of them, were or was the owner of the said goods and chattels, or had a leviable interest therein.

The cause was tried, upon the issues made by the pleadings, before Campbell, Justice, and a jury, in December, 1854.

Upon the trial, the counsel for the plaintiff gave, in evidence, a judgment-roll, in an action by the plaintiff, against Thomas Turner and Louis Schmulling, for the delivery of the possession of the goods and chattels now in question. And upon the complaint, forming a part of the roll, there was endorsed the following certificate and return, which, it was proved, was signed by the defendant:—

“By virtue of the within requirement, to me directed and delivered, I have caused a portion of the within mentioned goods and chattels to be taken, to wit: twenty-five boxes Rhenish wine, one box do., four boxes eau de Cologne, nine packages of linen; and have summoned the within named defendant, and served upon him

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a copy of the undertaking, given by the plaintiff in the within action, and also a copy of the within requirement and affidavits, by which the property was taken; and that, no notice of exception being served upon me, I therefore delivered the property, taken by me, to the plaintiff, as within I am commanded. I further certify, that the balance of the property has been elogned, removed or concealed, so that I could not take the same.

"Dated New York, April 6, 1854.

"JOHN ORSER, Sheriff."

The counsel for the defendant objected to the admissibility of this evidence. The objection was overruled, and the counsel excepted.

Selah, a deputy of the defendant, then proved, that, as such deputy, and by virtue of the summons, complaint, and affidavit, in the action against Turner & Schmulling, he had taken from their possession the boxes of wine, &c., mentioned in the sheriff's certificate, and had removed the same to the store of one Nash, an auctioneer, in Broadway; that he gave to the plaintiff an order upon Nash, which was accepted, for the delivery of the goods; and that the plaintiff had paid to him twelve dollars, for his fees, and also four dollars to Nash, for storage and insurance. These payments were made on the 10th of February, 1854.

Crombie, another deputy of the defendant, then proved, that, on the same 10th of February, having been informed that the plaintiff had obtained an order for the goods, he went to the store of Nash, and forbade and prevented the delivery of the same to the plaintiff; and that he (the witness) then claimed and took possession of the goods, under the two attachments referred to in the defendant's answer.

The counsel for the defendant then offered to prove, by the same witness, that, under these attachments, he had attached the property in question, in August, 1853, previous to the commencement of the plaintiff's action against Turner & Schmulling.

The counsel for the plaintiff objected to this testimony, upon the ground, that the defendant was estopped by his certificate and return from justifying the taking of the property from the possession of the plaintiff, by a previous levy, under the attachments.

The objection was overruled, and the counsel excepted.

The witness then testified, that the attachments were delivered to him, for service, in August, 1853; that certain boxes and other property, which he was informed belonged to Pfeiffer Von Kamp & Co., and of which the marks had been given to him, were in the public store, and, as the duties had not then been paid, he did not then take possession of it, but made a levy, by serving copies of the attachment, with notice, on the collector, and on Schmulling, of the firm of Turner & Schmulling, to whom he understood the property was consigned; that he next heard of the property at Nash's store, and that the property, of which he there stopped the delivery and claimed to hold, under the attachments, he believed to be the same that he had before attached, but that he had made no inventory of it.

The attachments were then read in evidence. Each was dated 11th August, 1853, and, after reciting that the application was for an attachment against the property of Pfeiffer, Von Kamp, and C. F. Herx, composing the firm of Pfeiffer, Von Kamp & Co., and for a debt due from them as partners, the first, directed the sheriff to attach, and safely keep all the property of Pfeiffer, Von Kamp & Co., or each of them, within his county; the second, contained the same direction, omitting the words "or each of them."

The testimony on the part of the plaintiff being closed, the counsel for the defendant moved for a dismissal of the complaint, upon the ground, that the plaintiff had not shown any right or property in the goods whatever, and that, as they had been attached, they were in the custody of the law, and the rights of the plaintiff, if any he had, were subject to the rights and special property of the sheriff.

The motion was denied, and the counsel excepted.

The defendant then called, as a witness, Franz T. Herx, who, upon his examination and cross-examination, proved, that the goods in question arrived here in the ship *Eliza*; that the invoice was in his name, and the bill of lading to his order, and that he owned the goods, and had paid all the charges thereon, including the duties, and that he had placed them in the hands of Turner, Schmulling & Co., to sell, on commission, upon his account.

He was then asked, by the counsel for the plaintiff, whether he was a member of the firm of Pfeiffer, Von Kamp & Co. The

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counsel for the defendant objected to the question, as irrelevant. The objection was overruled, and the counsel excepted.

The witness then swore, that he was not, and never had been a member of the firm of Pfeiffer, Von Kamp & Co.; that he had bought the goods himself, and with his own funds, and that, after his arrival here, finding it difficult to get money from Turner, Schmulling & Co., he had sold the goods to the plaintiff, who had paid him, partly in cash, and partly in his notes. The witness also proved the value of the property, in respect to which there was no contradictory evidence.

The jury, under the direction of the court, found a verdict for the plaintiff, and assessed the value of the goods at \$919, and the damages of the plaintiff, for their detention, at \$53.61. The verdict was taken, subject to the opinion of the court, upon a case, to be heard, in the first instance, at General Term, with liberty to the court to dismiss the complaint, and order judgment for the defendant.

J. Sutherland, for the plaintiff.

The plaintiff is entitled to judgment, upon the verdict; the justification set up, under the attachment, having wholly failed. There was no legal proof of a levy, under the attachments, before the commencement of the action against Turner & Schmulling; and, admitting that the goods were attached at Nash's store, when about to be delivered to the plaintiff, the mere production of the attachments, and proof of a levy under them, amounted to nothing, without proof of the other facts set up in the answer, namely, that the goods were the property of Pfeiffer, Von Kamp & Co., or of one of the firm, and that they were indebted to the plaintiffs in the attachments, as alleged in the answer; and of these facts, the affidavits, upon which the attachments were founded, and which were read in evidence upon the trial, were certainly not evidence. It had, moreover, been proved, conclusively, by Franz T. Herx, whom the defendant himself had called to testify, that the goods were his individual property; that he never was a member of the firm of Pfeiffer, Von Kamp & Co., and was never indebted to the plaintiffs in the attachments. This witness had, in fact, disproved the whole of the defendant's pretended justification.

A. J. Vanderpoel, for the defendant.

The verdict ought to be set aside, and a judgment, dismissing the complaint, be entered for the defendant. The defendant was entitled to the possession of the goods, by virtue of the levy, under the attachments made by his deputy, in August, 1853. As the goods were then in possession of the government, under their liability for duties, they could not be manually seized by the sheriff. He could only attach them, under § 235 of the Code, as this court had decided, in *Brownell v. Carnley*, (8 Duer, p. 19.) The levy was properly made, under that section, and the subsequent purchase, by the plaintiff, was subordinate to the lien, which the defendant, as sheriff, then acquired. Nor was the defendant estopped, from asserting his lien and special property, by his return in the suit against Turner & Schmulling. When acts or admissions are relied on, as creating an estoppel, it must be shown, that they were designed to influence the conduct of the party setting them up. (*Carpenter v. Westervelt*, 1 Kernan, 784.)

The counsel also contended, that the Judge on the trial had erred, in the admission of evidence, and, particularly, of the evidence that Herx was not a member of the firm of Pfeiffer, Von Kamp & Co.; and that he had also erred, in not granting the motion for the dismissal of the complaint.

BY THE COURT. DUER, J.—We think that the plaintiff upon several grounds (all of which, however, it will not be necessary to state) is entitled to judgment upon the verdict.

We can see no reason for doubting that the defendant is concluded, by his certificate and return in the action against Turner & Schmulling, from denying any of the facts, which the certificate asserts, expressly, or by a necessary implication. He is, therefore, concluded from denying that, under the proceedings in that action, he took the goods from the possession of the defendants Turner & Schmulling, and delivered them into the possession of the plaintiff, and, consequently, from denying that they were in the actual possession of the plaintiff when they were again seized, by his deputy Crombie, upon the ground that they were bound by a prior levy under the attachments. Nor is this all. The defendant, by his voluntary delivery of the goods to the plaintiff,

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practically admitted that he had no right to hold them under the attachments, and, so far as the plaintiff is concerned, he released them, by this act, from any lien, that a prior levy might have created. If such a levy had, in fact, been made, it was his plain duty to have stated, in his return, that the goods were not in the possession of the defendants, Turner & Schmulling, but were in his own custody, by virtue of the attachments. The return that he made is, therefore, conclusive proof that, in his own judgment, the goods were not in his custody, and that he could not lawfully withhold them from the possession of the plaintiff; and, if so, he had, assuredly, no immediate right to disturb the possession that he had delivered. It may be, that when he delivered the possession to the plaintiff, he was ignorant of the fact that the attachments were then in the hands of a deputy, and, consequently, was ignorant of the proceedings of the deputy under them; but it is familiar law, that the knowledge and acts of a deputy, in the discharge of his official duties, are the knowledge and acts of the sheriff, so that, whether the sheriff acts, personally, or by a deputy, his liability to third persons, whose rights and interests are injuriously affected by the acts, is precisely the same.

There is a manifest error in the assertion that the acts and admissions of the defendant had no tendency to influence the conduct, and worked no prejudice to the interests, of the plaintiff, and, therefore, could not operate to create an estoppel, excluding a defence that would otherwise have been available.

The return made by the defendant, in the suit against Turner & Schmulling, was evidence, upon the record, that the goods, for the recovery of which the action was brought, had been delivered to the plaintiff, and this evidence necessarily prevented him from obtaining a judgment for the value of the goods, to which, as against those defendants, he would otherwise have been entitled. The defendant, by his return, prevented the plaintiff from obtaining this judgment, and then, by taking from him the goods that he had delivered, rendered the judgment, that was obtained, wholly valueless. It would, therefore, seem that no remedy was left to the plaintiff, unless by an action against the defendant, and it is impossible to say that he would not be prejudiced by permitting the defendant to set up as a defence the falsity of his own return,

or, which is substantially the same defence, that the return is not that which his duty as sheriff required him to make.

Nor, as we apprehend, would the case be altered, were we to hold that the judgment-roll, including the defendant's return, was improperly received in evidence, since all the facts, that the return certifies, were distinctly and fully proved by the deputy, Selah. He proved that the goods were taken by him from the possession of Turner & Schmulling; that he removed them to the store of Nash, the auctioneer; that he gave to the plaintiff an order for their delivery, which Nash accepted; and that the plaintiff paid his fees and the charges of Nash. From this time, therefore, it cannot be doubted that the goods, although not removed from the store, were, in judgment of law, in the plaintiff's possession, and were held by the auctioneer merely as his bailee, and these are the facts that, in our opinion, and without calling in aid the return, may be justly held to exclude a defence under the attachments.

It is not, however, solely upon the ground of an estoppel that we intend to place our decision, and I shall therefore pass over that objection entirely, in the observations that are to follow.

As it is certain, that the goods were taken by the deputy Crombie, from the possession of the plaintiff, if that taking was wrongful, as the complaint avers, the plaintiff must be entitled to recover. And the taking was undoubtedly wrongful, if the plaintiff was then the owner of the goods, and no valid levy had been made, under the attachments, before his title was acquired.

It is not necessary to decide whether, when the testimony was closed on the part of the plaintiff, there was sufficient proof that he was the owner of the goods, or whether the motion then made for the dismissal of the complaint ought not to have been granted. We strongly incline to the opinion that the proof was sufficient, as the case then stood; but were this otherwise, the defect was fully supplied by the testimony of a witness called by the defendant, the uncontradicted testimony of Herx. He proved that the goods were his individual property, purchased with his own funds, and that before the commencement of the action against Turner & Schmulling, he sold them to the plaintiff and received their price. The only question, therefore, is, whether, when this sale was made, the goods were bound by the attachments then in the hands of the sheriff, so as to defeat the title of a purchaser having

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no notice that the attachment had been issued, for that the plaintiff is chargeable with notice has not been pretended.

The goods, it is certain, were not then bound by the attachments, unless the service, that the Code requires, had been duly made, nor unless the goods were the property of the persons named in the attachments, or of some one of them.

It is not denied, that the goods of a debtor are no more bound by an attachment under the Code, before its actual service, so as to defeat the title of a purchaser in good faith, than, as against such a purchaser, they are bound by an execution, before an actual levy. It is not pretended, that an absolute lien is created by the mere issuing of the process.

It is, also, certain, that if the attachments had not been served before the plaintiff acquired his title, the goods could not be attached, although the attachments remained in the sheriff's hands, after the plaintiff became the owner, for the plain reason, that, whatever might have been the fact when the attachments were issued, the goods were not, at that time, the property of the persons named in the attachments, or of any one of them.

The alleged service, which is relied on as a valid levy, was made in August, 1853, and as the goods were then in the custom-house, and the duties unpaid, the counsel for the defendant was right in saying, that the sheriff could not require a manual delivery of the goods, but, according to the decision of this court in *Brownell v. Carnley*, (3 Duer, 9,) could only execute the attachments in the mode prescribed by § 285 of the Code.

By the provisions of that section, when the property to be attached is incapable of a manual delivery, the attachment may be executed by leaving a certified copy of the warrant with the individual holding the property, together with a notice "showing the property levied on."

In this case, a certified copy of each warrant, together with a notice, was served upon the collector, and upon Turner & Schmulling, who, it is alleged, were the consignees of the goods, but the notice, as we infer from the evidence, and understand to have been admitted upon the argument, was general in its terms, and contained no specification whatever of the property meant to be levied on. It appears to us, that for this reason it was insufficient and void.

We think the words of the Code, describing the notice as "showing the property levied on," are significant and material, and can only be satisfied by a notice, particularly describing the property, so as to enable the holder to identify it, and when released from his own lien or claims, deliver it, or its proceeds, to the attaching officer. It is this construction that, in our opinion, the words, and the policy of the law, alike require. A notice referring in general terms to the property, as belonging to the person or persons named in the warrant of attachment, would be plainly useless, since it would convey no other or further information than is contained in the warrant itself, and, of course, in the copy required to be served. The requisition of a notice thus general would be superfluous and unmeaning. Section 232 of the Code makes it the duty of the sheriff, to whom a warrant of attachment is directed, to make and return an inventory of the property, and, we apprehend, that such is his duty, in all cases, whether the warrant be executed by the manual delivery of the property, or by the service of a copy and notice. Hence, if, in all cases, an inventory must be made, it must, in all cases, be in the power of the sheriff to render the notice specific, since it will be rendered so by making it correspond with the inventory. If he has sufficient information to enable him to make an inventory, he has sufficient to enable him to give the notice, that, we think, the Code requires; and if he has not the information, it seems to us, that it is his duty to obtain it before he attempts to execute the warrant. In the present case, no inventory, it is proved, was made, and we refer to the fact as evidence that the notice was general. A proper specification in the notice would have been, in effect, an inventory.

Upon full consideration, we are convinced, that the service of a notice such as the Code requires, that is, a notice "showing the property levied on," in the sense that we attribute to these words, is essential to the due execution of a warrant of attachment, where the property to be attached is "incapable of a manual delivery." It follows that, as, in the present case the requisite notice was not given, the goods in question—even on the supposition that they belonged to the persons named in the warrants when the attachments were granted—were not levied on, under the warrants, at

any time, before the plaintiff acquired his title, and were, therefore, wrongfully taken from his possession.

Finally, could we assent to that construction of the Code, for which the counsel for the defendant has contended—and which, we regret to learn, is that upon which the plaintiff and his deputies have usually acted—or, had it been clearly proved that the notice given was precisely that we deem to have been necessary, it would still be our duty to hold, that the justification set up has wholly failed, and that the plaintiff is entitled to recover.

The defendant had no authority under the attachments to seize, or levy on, the goods in question, as the supposition that they belonged to the persons named in the warrants, or to any one of them, so far from being established, is disproved, by the evidence.

Each warrant was granted to enforce the payment of a debt alleged to be due from the firm of Pfeiffer, Von Kamp & Co. The persons named as composing the firm are, Pfeiffer, Von Kamp, and C. F. Herx—and the defendant was directed to attach their joint and separate property—but the goods in question were not the property of the firm, nor of any one of the persons named as partners. They belonged exclusively to the witness Franz T. Herx, by whom they were sold to the plaintiff. Hence, the levy upon the goods, while in the custom-house, however regular it may have been in its form, was unauthorized and void, and the taking of the goods from the possession of the plaintiff, a wrong and a trespass.

The only reply that has been given to these views consists in an assumption—upon which the argument for the plaintiff was wholly rested, that Franz T. Herx and C. F. Herx were in reality the same person, and the mistake in the name, a trivial error, that might be justly disregarded. But we regard this assumption as purely gratuitous; no proof was given or offered of the alleged identity, and we have no right to say that it existed.

Had it been proved, that Franz T. Herx was a partner in the firm of Pfeiffer, Von Kamp & Co., and was the only person of the name of Herx in the firm, the misnomer would have been apparent, and might have been treated as immaterial, since it was certainly the property of the partner Herx, that was meant to be attached. But the proof is, that Franz T. Herx was not, and never had been, a member of the firm, while there was not a par-

ticle of evidence to show, that a real person of the name of C. T. Herx was not a partner, and the partner whose name was concealed under the general words, "and Co.;" and in the absence of contrary proof, we think, that we must intend that such was the fact, for it is this fact, that the warrants of attachments and the affidavits upon which they were founded, distinctly affirm.

It may well be, that the plaintiffs in the attachments, supposed that the Herx to whom the goods belonged, was the partner Herx, in the firm that was indebted to them; but this was a mistake of the person, and not of the name, and, assuredly, gave no right to them, or to the sheriff acting under their orders, to seize the goods of the innocent owner, to secure the payment of a debt that he never contracted, and for the payment of which, upon the very face of the process, other persons were wholly liable.

No one can doubt, that the sheriff, in proceeding under an attachment, acts just as certainly at his own peril, in applying the process to the property described, as in proceeding under a final execution. When he seizes and removes the property of A, under an execution against B, he is liable as a trespasser. He is just as liable, when he commits the same mistake and wrong in acting under an attachment, and it is this mistake and wrong that the defendant appears to have committed, through his deputies, in the case before us.

Upon all the grounds that have been stated, the jury was properly directed to find a verdict for the plaintiff, and he is, therefore, entitled to the judgment that he now claims.

Judgment for the plaintiff accordingly, with costs.

CHARLES FRENCH v. PLIN WHITE.

The assignor of the plaintiff had loaned to the defendant large sums of money, through the years 1851 and 1852, payable on demand. In November, 1853, he accepted various promissory notes for the amount then due, payable at different periods, some of which had not matured at the commencement of this action. To sustain it, as thus brought for the whole amount loaned, it was alleged by the plaintiff that the extension of credit by the notes, was obtained through fraudulent representations of the defendant, as to his property. It was also alleged, that the original loan was obtained by similar frauds.

The jury, (under a charge of the court, that the plaintiff could not recover unless the fraud was proven,) found for him, thus finding the fact of fraud.

Upon the well-settled rule of law, the assignor could have recovered for the money originally lent, surrendering the notes thus fraudulently given, at the trial.

Held, that an assignee of the claim and notes had the same right. That the assignment was not a mere transfer of a right to receiver for a tort, but of a money demand, which the fraud in procuring the extension, reinstated in its original force and character.

The allegation of fraud, in procuring the original loan, was in no way material to the right of action, nor for any purpose of the trial, except as evidence of a pre-meditated scheme to defraud the party.

An exception, in the following terms, to the charge of the court, "The defendant's counsel excepted," is too general, and cannot be regarded as an exception.

Although fraud had been made out, in obtaining the loan, the plaintiff could not have recovered, unless fraud in procuring the extension was also proven. If there was no fraud originally, yet the action could be sustained, if there was fraud in inducing the party to take the notes.

Evidence was allowed at the trial, of imposition and fraudulent statements, made by the defendants to other persons, during the period of making the loans in question.

Held, that had the question here been as to fraud in procuring the loans, such evidence was plainly admissible.

Held, further, that as evidence of this fraud was allowable, to show an original and continued scheme to defraud, testimony as to contemporaneous frauds of the same character, practised upon others, was also admissible.

(Before Bosworth and Woodruff, J.J.)

January, 1856.

CASE upon a verdict in favor of the plaintiff, ordered to be heard at the General Term in the first instance, and judgment, in the mean time, suspended.

P. W. Clark, for plaintiff.

L. B. Shephard, for defendant.

The material facts sufficiently appear in the opinion of the court.

BY THE COURT. WOODRUFF, J.—In this case it appeared, and the verdict must be taken to find, that George W. French lent to the defendant twelve thousand five hundred dollars, in various sums, from time to time, in the years 1851 and 1852. The testimony in regard to the terms of the loan is, that there was no agreement as to the day of payment or rate of interest. The money was, therefore, payable by the defendant on demand.

If the lender had assigned his claim for this money to the plaintiff, while it remained in the simple form of a claim for money lent, there would have been no question of the right of the latter to recover—the case would have exhibited an ordinary money demand, assigned to the plaintiff by the creditor, and the plaintiff's right of action would have been complete, by proving the loan by the assignor and the assignment to himself; and had this been the whole case exhibited by the parties, the question whether the defendant procured the loan by fraudulent representations would have been wholly immaterial, and the evidence, bearing upon that question, irrelevant.

But, in November, 1853, many months after the money was lent, the assignor of the plaintiff accepted the promissory notes of the defendant, payable, at various dates, for the amount of the loan, some of which notes were not due at the time this action was brought. To avoid the effect of these notes, as an extension of the time of payment of the moneys, the plaintiff avers, that his assignor was induced to take these promissory notes, by the fraudulent representations of the defendant, in regard to his property and ability to pay, and was deceived and defrauded into the giving of this extended credit. It is true, that the complaint also avers, that the original loan was procured by false and fraudulent representations, but this averment, I apprehend, might have been struck out, as immaterial and unnecessary to sustain the plaintiff's action, since, as before remarked, if the loan was made and was payable

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on demand, the right of action was complete, whether there was fraud in procuring the loan or not. The proof of the original fraud, on the trial, was not necessary, nor material, except so far as it formed part of an entire scheme to defraud, which terminated in inducing the assignor of the plaintiff to accept the defendant's notes, before referred to. The jury have found, distinctly, that the defendant was guilty of the fraud alleged, under a charge from the court, which instructed them, that, unless they found the fraud, they could not find for the plaintiff.

Under this verdict, the case stands thus: the assignor of the plaintiff, having a money demand, for loans made to the defendant, is induced, by fraud, to accept promissory notes giving an extended credit to the defendant.

It is not necessary to examine the reports, to find authority for the proposition, that this fraud vitiated the credit thus agreed to, and no obligation whatever rested upon the assignor of the plaintiff, to delay his action for an hour. All that it was necessary for him to do, was, to produce the notes, on the trial, to be cancelled. Indeed, upon the facts, thus found, it is manifest that the assignor of the plaintiff had, at all times, from the moment the loans were made, to and at the time of the assignment, a just and valid claim to the money lent, and a right of action therefor.

Under these circumstances, he assigned this claim to the plaintiff, and delivered to him the notes; and I perceive no ground, upon which to hold that such a claim was not assignable.

The counsel for the defendant has treated the assignment, as if it were the assignment of a mere tort, and referred us to some authorities, which, he conceives, show, that the right to recover damages, for a tort of this description, is not assignable. But the present is an action for money lent—not for damages, as such. The complaint states the lending of the money, a demand of repayment, non-payment by the defendant, and demands judgment for the sum remaining due, with interest. It may, perhaps, account for the introduction into the complaint of the averment, that the debt was, in the first instance, fraudulently contracted, to suggest, that it was at one time held, by some Judges, that if the plaintiff desired to arrest the defendant on that ground, and, finally, to have execution against his body, such an averment in the complaint was necessary; but that doctrine being repudiated, the fact, that the de-

fendant procured the loans by fraud, was in nowise material to the right of action, nor material for any of the purposes of the trial, unless it was evidence of the scheme, which was consummated by inducing the plaintiff's assignor to take the notes, as before suggested.

The question, whether a right of action for a tort is assignable, and under what circumstances, does not arise. As conceded by the defendant's counsel, it was the claim for the money lent which was assigned, and that is the claim set up in the complaint, and for which judgment is demanded.

There was no proper exception to the charge of the court to the jury. The general statement, that the defendant excepted to the charge, is too general to be treated as an exception, unless every part of the charge is erroneous, and so it is well settled. (*Lansing v. Wiswall*, 5 Denio, 213; *Haggart v. Dunn*, 1 Selden, 422-7; *Jones v. Osgood*, 2 id. 233; *Hunt v. Maybee*, 3 id. 273, 4 id. 37; 1 Kernan, 416.) But it seems, at least, doubtful whether the Judge was not himself misled, by the averments in the complaint that the original loans were procured by fraud, for, in his charge, he says: "The first question is, was this money lent upon fraudulent representations?" If he had made the right of the plaintiff to depend upon this question alone, there would, I think, have been error in his direction, for which, on a case, a new trial should be ordered; for, according to the views above expressed, the title of the plaintiff to recover did not at all depend upon this question. If the money was lent upon such representations, still the plaintiff could not recover, unless the fraud also extended to the giving and receipt of the notes, afterwards taken for the loan, by the plaintiff's assignor. And, on the other hand, if there was no fraud, in the procurement of the loan, the plaintiff was entitled to recover, if he showed that the defendant induced his assignor to take the notes by fraud.

But the court did not leave the case upon that sole question; the instruction to the jury was, also, that, to entitle the plaintiff to recover, they must "also find, that White committed a fraud, in inducing French to accept the notes."

The defendant, therefore, has no cause of complaint, in this respect, but rather the plaintiff, if the views above expressed are correct.

In substance, the charge was, that, to entitle the plaintiff to recover, the jury must find, not only that the loan was procured

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by fraud, but that French was afterwards also induced, by fraud, to accept the notes; whereas, according to our view of the case, if French was induced by fraud to accept the notes, the plaintiff was entitled to recover, whether the loan was originally procured by fraud or not.

There is, therefore, in this respect, no reason to interfere with the verdict. The charge was more favorable to the defendant than he had a right to ask.

It is urged, that the court, in the charge to the jury, called to their attention matters tending to prove fraud, on the part of the defendant, which were not specified in the complaint. In the first place, the complaint avers specific representations, and that they were false, and were made to defraud. The court refers to those representations, and presents to the jury the inquiry, whether the money was loaned upon such fraudulent representations. The further reference of the court, to the conduct of White, was quite proper, because these acts bore directly upon the intent with which the loan was procured. Although these acts were not the acts of fraud averred, they were proper evidence of the fraud of the defendant in the acts which were averred, and it is, in this view, they were submitted to the jury. But, in the next place, the defendant has no reason to complain of this part of the charge, for, as last above suggested, the plaintiff was entitled to recover, whether this portion of the fraud was proved or not.

It does not appear, very distinctly, by the case, at what time the fraud, on the part of the defendant, in inducing the assignor of the plaintiff to receive the notes, was discovered; and no point was made, on the trial, nor on the argument of the appeal, on the question, whether the recovery of judgment upon two of the notes, could operate to prevent the plaintiff's repudiating the credit, fraudulently obtained by the defendant. It is, therefore, unnecessary to inquire, here, under what circumstances, if any, the bringing of an action, and recovery of judgment, upon a portion of the notes, would prevent the subsequent surrender of the residue, and his claim to recover, for the original loan, to the amount covered thereby.

The only remaining question is, whether there was any error in receiving the testimony of Willet N. Hawkins, showing like false representations made by the defendant to him, and procuring

money from him, under circumstances plainly indicating falsehood and fraud, on the part of the defendant, during the very period in which he was procuring the loans in question from the plaintiff's assignor.

That this evidence was proper, if it was material to show that the loan was procured by fraud, cannot be questioned. That when the question is, whether a vendee of goods procured the sale by fraud, like transactions with others, at, or about the same time, may be given in evidence, with a view to the *quo animo*, was held, in *Cory v. Hutching*, (1 Hill, 311,) and numerous cases are cited in support of the decision. The case of fraud, is regarded as an exception to the general rule of evidence, in regard to similar testimony. And see also *Olmsted, &c. v. Hutching*, (id. 317.)

The plaintiff relied upon showing, that the defendant had been engaged in a scheme, to defraud those upon whose credulity he could impose; and the entire history of the defendant's dealings with him, in regard to this money loaned, would tend, in some degree, though perhaps remotely, to show that it was with a continued intent to defraud, that he made the representations, inducing the plaintiff's assignor to receive the notes. The acts of the defendant, from the beginning to the end of the particular transaction in question, and the repetition of representations, all of which proved false, may all tend to establish the fraud. But the more satisfactory answer to the objection, is, that the whole of the proceedings in the action, from the complaint to the verdict, were conducted under the idea, that it was necessary for the plaintiff to prove that the debt was fraudulently contracted, and the court charged, that, to warrant a verdict for the plaintiff, the jury must find that the loans were procured by fraud. This evidence, as above suggested, tended directly to show the intent of the defendant, in those contemporaneous transactions; and the defendant cannot, with propriety, object, that the plaintiff was required and permitted to prove all the facts, alleged in the complaint, and put in issue by the answer.

It is not urged that the verdict is against evidence, or without evidence to support it. The proof of fraud in inducing the assignor of the plaintiff to accept the notes is very slight; the evidence that he believed the defendant's representation that he was at that time worth \$300,000, is still less. And that he could have

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relied upon any such representation, with knowledge of the previous acts of the defendant, and his absconding to Europe in the manner he did, seems hardly probable. And so, also, the question whether the recovery was not, in fact, to a large extent, for the identical moneys for which other parties had previously obtained judgments against the defendant, as the real principals in the loans procured by the defendant through the plaintiff's assignor, appears to us to involve the justness of the verdict in great doubt. But no such points are made by the defendant. The case has been treated by both parties as before us upon questions of law only, and we ought, therefore, to regard the verdict of the jury, under all the circumstances, as conclusive upon these questions, though we yield to it with some hesitation.

We think the grounds urged upon us, in the argument, and points submitted on the part of the defendant, do not require us to interfere with the verdict.

Judgment should therefore be entered for the plaintiff, in conformity with the verdict, with costs.

CHARLES GOULD v. BOLTIS M. SEGEE, impleaded, &c.

The rule that protects the *bond fide* holder of negotiable paper, fraudulently or feloniously put into circulation, applies to all negotiable paper, whether payable to bearer, or order, immediately, or on a future day.

The protection of the rule is not confined to those whose usual business it is to deal in negotiable paper, but extends to every person to whom such paper may be lawfully transferred, and who, by the payment of value, may acquire a title.

The satisfaction of a precedent debt, this court has frequently decided, is a valuable consideration, within the meaning of the rule, and this, since the decision of the Court of Appeals, in *Youngs v. Lee*, (2 Ker. 552,) must be deemed the settled law of the state.

When a parting with value is proved, the amount of the consideration paid is not otherwise important than as bearing on the question of actual or constructive notice.

Hence, when usury is not set up as a separate defence, unless it is so gross as to create a presumption of fraud, the proof of its existence may be justly disregarded.

A person whose name, written by himself, is on the back of a negotiable bill or

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note, is liable as an endorser to a *bona fide* holder, although he may not have delivered the paper to any one for the purpose of transferring a title.
Verdict for defendant set aside, and new trial granted.

(Before DUKE, BOSWORTH and HOFFMAN, J.J.)

Heard, January; decided, February, 1856.

APPEAL, by plaintiff, from a judgment in favor of defendant, Segee.

The action was against Segee, as the maker, and Frederick W. Geissenhainer, as the endorser, of a promissory note for \$195.00, dated February 28, 1853, and payable, three months after date, to the order of Geissenhainer. The complaint contained the usual averments.

The defendants answered separately. Each answer admitted the making and endorsement of the note, and set up as a defence the following facts.

That the note was made for the accommodation of Geissenhainer, to whom it was delivered by Segee. That Geissenhainer endorsed the note, and put it in a desk in his office; that, during his absence, one H. Parker came there, took the note from the desk, and carried it away under a pretence of procuring the same to be cashed; that Parker passed the note to one Courtlandt Palmer, who gave no valuable consideration for it, but took it in payment of an old debt; that Palmer was the holder of the note when it became due, and that the plaintiff had not acquired the same for a good and valuable consideration.

The cause was tried before Oakley, Ch. J., and a jury, in October, 1854.

The following are the proceedings on the trial.

The plaintiff produced and put in evidence the following note and endorsements, and proved the amount of principal and interest due by the face thereof was \$192.24.

\$175.

February 28th, 1853.

Three months after date, I promise to pay, to F. W. Geissenhainer, Jr., or order, one hundred and seventy-five dollars—value received.

BOLTON M. SEGEE, 820 Broadway.

(Endorsed) F. W. GEISSENHAINER, Jr.

(Also endorsed) C. PALMER.

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The defendant Segee called, as a witness, his codefendant, Frederick W. Giessenhainer, Jr., who testified, that Segee lent him the note, for his accommodation, and to enable the witness to raise money to take up a previous note of the witness, endorsed by Mr. Segee, which had been discounted in bank, and was then about to become due, and he never gave Mr. Segee any thing for it; that he, the witness, did not negotiate the said note, or pass it away, but, having endorsed it, he placed it with another note, in a drawer of a desk in his office, and never saw it afterwards, nor did he know, of his own knowledge, how it got into circulation or into the hands of the plaintiff.

Cross-examined.—The witness added as follows: I left my office, where the desk was, at two o'clock; I returned the same afternoon, about four o'clock, and found the notes gone; I inquired of my clerk, Mr. Donaldson, what had become of them, and he said one Hiram Parker had come in, and, having opened the drawer and found the notes, took them away, and said he would get them cashed; I found fault with him for allowing Parker to take them; he said, that Parker said "it was all right;" I never delivered this note to Parker, for that or any other purpose; I went to look for Parker, but could not find him; I went to a place where he had kept an office, and to other places, but could find nothing of him, and shortly afterwards I found Parker locked up in Eldridge street jail; I went to the jail and saw Parker, and asked him for the note; he promised to return it to me, and said he had not used it; from what he said, I inferred it was among his papers, somewhere else, and not there in the jail; I did not advertise the note, nor give public notice of its loss, because I expected to find him, daily, until I found him in the jail, and because, when I saw him, he promised to return it; I did not bring an action against him, to recover the note, for the same reason, and because it would be useless; he was already in jail, and I could do no more than put him there, and, besides, he promised to return it; Parker had been at my office several times; he was not a client; he had sold some lots to me, and I had paid him money on account of them, but I ascertained that he had no authority to sell them; I had known Parker two or three months, but had known him as a real estate broker for some years; he has never settled with me, in regard to the lots he professed to sell me; I borrowed this note from Mr. Segee, for my

own use; I intended to get it discounted, for the purpose of paying a note then in bank, but, having received some money from another source, I put it into my drawer, after having carried it in my pocket three or four days; Parker had an office in the Fourth avenue, and I went there to look for him; I also went to the Sixth avenue, where he formerly had an office, but could not find him; I lived in Fourteenth street, near Fourth avenue, at the time, and Mr. Segee kept a store at the corner of Broadway and Twelfth street.

Direct.—I received this note on the day of its date; Parker was utterly irresponsible, and generally known to be so; he left the country, on his release from prison, and I understand he has gone to California.

Alexander Donaldson, a witness for both defendants, testified as follows: I am clerk of Geissenhainer, and have been so since February 1st, 1853; I have seen this note before; I cannot fix the exact time, but it was shortly after the date; Mr. Geissenhainer had it, and placed it in a drawer of his desk; whilst Mr. Geissenhainer was absent from his office, Hiram Parker came and sat down at Mr. Geissenhainer's desk, and wrote something; he then opened the drawer where the notes were, and, after looking at them awhile, he got up to go out; I told him, "I cannot authorize you to take away those notes," but he said it was "all right;" I told him I had no authority to deliver them to him, but he repeated that it was all right, that they were intended for him, or something to that effect, and went out; when Mr. Geissenhainer came in, I told him what Parker had done, and he found fault with me; he said he would go and find Parker and get them back, and went out; I never saw any thing of Parker afterwards, until I was informed he was in the Eldridge-street prison; I then went to see him, by direction of Mr. Geissenhainer, and asked him for the notes; he said he had them and would return them, and I reported to Mr. Geissenhainer what he said; I understand Parker is gone to California, and that he went directly after he was liberated from prison.

Cross-examined.—This witness added: that he knew Parker before, and had seen him several times in Mr. Geissenhainer's office, and knew him very well; upon this occasion, he sat at the desk and wrote, perhaps, ten minutes, before he opened the drawer and took out the notes; Parker was a real estate agent or broker, and I have heard him say that he sometimes negotiated bills and notes;

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he did not say that he was going to take this note to get it discounted, and I did not tell Mr. Geissenhainer that he said so; Mr. Geissenhainer thinks that I told him so, but he is mistaken; I did not, and could not have told him so; I inferred from Parker's manner that he intended to get the note discounted, and may have told Mr. Geissenhainer that inference, but I have no recollection of it; Mr. Geissenhainer said he must go and hunt him up, and went out; I never saw Parker about town, after his liberation from Eldridge-street jail, but understood he was about a short time.

Charles Gould, the plaintiff, being called by the defendants, testified as follows: After this note fell due, I purchased it for \$162.50; it had been endorsed by Courtlandt Palmer; I bought it of him, and paid him for it; it is exclusively my own.

Courtlandt Palmer, a witness for the plaintiff, testified as follows: In March, 1853, before the maturity of the note, I discounted it in good faith, for a valuable consideration, without notice or suspicion of any defence existing against it; I took it from Hiram Parker; he requested me to cash the note to oblige him, and told me that it was a business note which he owned, and which he had received from the endorser, Mr. Geissenhainer, for commissions on the sales of real estate, and I believed what he said; after some conversation, I told him I would cash the note, if he would deduct the interest till maturity, and satisfy, from its proceeds, a due-bill I then held against him for about twenty dollars and interest; this he declined doing at that time; about two days afterwards, Parker called a second time, at my office, with this note, and then said he would comply with said terms; I thereupon took the note from him, gave him my check for \$145, which was paid at the bank, and cancelled his debt on the due-bill, which, with interest, came to a little more than the balance of this note; his first call, with the note, was March 6th, and his second call March 8th, and, both times, he came openly to my office, on Broadway, and remained at his case there; afterwards I endorsed the note, and had it discounted, and, after receiving notice of protest, I took it up, and subsequently transferred it, through a friend, to Mr. Gould; on receiving the notice of protest, I called on Segee, and asked him what it meant; he then told me, that he gave the note to Geissenhainer, as a business note, and for business purposes.

Cross-examined.—This witness added: The due-bill I discharged

was an old one, but it was not seven or eight years old; it was not barred by the statute of limitations; it was not outlawed; I did not deliver the due-bill to Parker, for I had not got it with me; I never delivered it; I purchased this note as a business note; there is no understanding between me and the plaintiff, and I gave no orders for the bringing or prosecution of this action; when Parker came to my office, both times, he was alone; I did not notice a sheriff, or sheriff's officer, in company with Parker, or in the neighborhood of him; I may be indebted to Mr. Segee; I believe he has a small bill against me; I did not tell his clerk that I would pay it, because I had a claim against Mr. Segee, on this note; I did not give that reason, but I said I would not pay it; Mr. Segee knows where I live, and has his remedy; I never called on Segee about the note, till after it was protested.

No other evidence was given on the trial.

The plaintiff's counsel requested the court to charge the jury, that the note, having been acquired by Palmer in good faith, and for a full and valuable consideration, before its maturity, and having been transferred, by him, to the plaintiff, the plaintiff was entitled to enforce the note, and have a verdict in this action, notwithstanding the alleged defence; and, also, that the plaintiff was entitled to recover the full amount of the face of the note, with interest.

The court thereupon charged the jury, that if they were satisfied, from the testimony, that Palmer received the note, before maturity, and for a valuable consideration, and subsequently transferred it to the plaintiff, the plaintiff was subrogated to all the rights of Palmer, at least, to the extent of what he paid for it, and might recover upon it, notwithstanding that he received it after it became due. That, notwithstanding what had been said about the note, as a business note, it was clear, that the note was loaned, by Segee, to Geissenhainer, for his accommodation, and had no vitality, until it was delivered to some one, as evidence of a valid subsisting debt. That, if the evidence for the defendant was entitled to credit, Parker had no legal title to the note, but his possession of it was tortious and fraudulent, though he could not be said to have stolen it. That the question, for the jury to pass upon, and upon which their verdict must depend, was, whether Mr. Geissenhainer had done what a prudent man should do, to reclaim the note, after he was informed that Parker had taken it, or whether he was guilty

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of such laches, and neglect, as would authorize them to infer that he assented to Parker's possession of the note, for the purpose of negotiating it. That, in rendering their verdict, they had a right to discriminate, and render a verdict in favor of one defendant, and against the other. That, so far as Geissenhainer was concerned, testimony given by him must be laid out of view, in considering their verdict, and they must look into the other testimony, to see whether he had succeeded in establishing his defence, but that his testimony was competent for the defendant Segee.

The court declined to charge the jury otherwise than herein contained.

The plaintiff's counsel hereupon excepted to that part of the charge which stated, that the question for the jury, on which their verdict must depend, was whether Geissenhainer had done what a prudent man should do, to reclaim the note, after he was informed that Parker had taken it, or whether he was guilty of such laches, and neglect, as would authorize the jury to infer that he assented to Parker's possession of the note, for the purpose of negotiating it.

The plaintiff's counsel also excepted to the refusal of the court above mentioned.

And the court further charged the jury, that, if they found for the plaintiff, against either or both of the defendants, their verdict must be limited to the sum paid by the plaintiff for the note, with interest on the sum from the time of such payment; to which charge and instruction the plaintiff's counsel excepted.

The jury found, for the plaintiff, the sum of \$177.66, against the defendant Geissenhainer, and in favor of the defendant Segee.

To set aside which verdict, as to Segee, and obtain a new trial against him, and also to recover judgment for the debt and interest against him, and also to ask for an increase of the verdict against Geissenhainer to the sum of \$192.24, a case was made, with leave to the plaintiff to turn the same into a bill of exceptions or special verdict.

January 30.—The case and exceptions were now argued.

C. Tracy, for the plaintiff.

The note was valid in Palmer's hands, and the plaintiff, by his

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purchase, acquired all Palmer's rights. The Judge's charge was, therefore, erroneous, both for his refusal to instruct the jury as he was requested, and for the instruction given that the verdict depended upon the authority of Parker to negotiate the note to Palmer. The judgment in favor of Segee ought, therefore, to be reversed, and, as against him, a new trial be granted. I refer to the following authorities, as conclusive in favor of the plaintiff. (1 Duer, 309; 4 Comst. 166; 5 Barb. 429; 21 Wend. 409; 23 id. 311; 1 Denio, 583; *White v. Springfield Bank*, 3 Sand. S. C. R. 222.)

The Judge's charge was also erroneous, in limiting the recovery against Geissenhainer to the sum paid for the note by the plaintiff. The verdict ought to have been for \$192.24, the sum actually due upon the note, and I move the court to increase it to that sum. (7 Wend. 569; 8 Paige, 552; 13 John. 52; 4 Hill. 482.)

J. S. Carpentier, for defendant, Segee.

The note never had a valid inception, and created no liability on the part of the maker, either to the payee or any other person; it was made for the accommodation of the payee, and, in the proper sense of the term, was never endorsed by him to any one. His accidental endorsement, not the result of a contract, could give no title to any one except, perhaps, to a person receiving the note in good faith, in the course of his business, without notice, and for a valuable and full consideration. (*Bromage v. Lloyd*, 1 Excheq. R. 32; *Brind v. Hampshire*, 1 Mees. & Welsby, 365; *Marston v. Allen*, 8 id. 494; *Cox v. Troy*, 5 B. & Ald. 474.)

Palmer was not a *bond fide* holder for value. He took the note for a precedent debt, and paid only a balance in cash. He did not give that full, fair and valuable consideration, which the authorities show was requisite to render his title perfect. (*Goldsmith v. Lewis Co. Bank*, 12 Barb. 407; *Bay v. Coddington*, 5 John. Ch. R. 54; S. C. 20 John. 639; *Catlin v. Gunter*, 3 Kern. 368.) As to the plaintiff, he bought the note for less than its nominal value, after it had been dishonored, and is chargeable, in law, with full notice. (12 John. 306; 1 Bos. & Pull. 648; *Holbrook v. Mix*, 1 E. D. Smith, 154. There was no error in the charge of the Judge, as to the amount of the recovery against Geissenhainer.

In fact, the verdict against him was for a larger sum than it ought to have been.

None of the exceptions to the charge of the Judge were well taken, and the judgment, instead of being reversed, ought to be affirmed, with costs.

BY THE COURT. DUER, J.—We apprehend that no rule of the law merchant is more fully settled, than that which affirms the title of a *bond fide* holder, for value, of negotiable paper, notwithstanding the person by whom it was transferred to him, had acquired its possession by felony or fraud; nor do we at all doubt that the salutary rule is just as applicable to paper transferable only by endorsement, as to that transferable by delivery alone; it is just as applicable to bills of exchange and promissory notes, payable to order, as to bank bills, payable to bearer. That such is the law is declared, or necessarily implied, in nearly every case, having any bearing on the question, that is to be found in the books, including those which, upon the argument, were cited, and mainly relied on, by the counsel for the defendant; and, using the very words of the Supreme Court of the United States, we hold ourselves justified in saying, that “the doctrine is so well and so long established, that it is laid up among the fundamentals of the law, and neither reasons nor authorities are now necessary to be brought forward in its support.” (*Swift v. Tyson*, 16 Peters, p. 1.) It is true, that the plaintiff purchased the note in suit after it became due, and if Palmer, from whom he made the purchase, had no right to transfer it, he cannot recover; but if the title of Palmer was unquestionable, that of the plaintiff cannot be impeached. He stands in the place of Palmer, and has succeeded to all Palmer’s rights and remedies.

The first question, therefore, is, whether, upon the evidence, we are not bound to say that Palmer was an endorsee for value, and without notice, and, consequently, whether, as the facts were undisputed, the jury ought not to have been instructed that the plaintiff was entitled to their verdict against both defendants. Palmer was the only witness by whom the transfer of the note was proved, and he was uncontradicted and unimpeached.

We must, therefore, regard it as certain, that the note came into Palmer’s hands before it was due, and that he gave value for it

when he received it; nor, unless he had actual or constructive notice of the fraud of Parker, is his good faith, in thus receiving it, liable to question. That he had actual notice is not pretended, and we are clearly of opinion, that no circumstances were shown that ought to have awakened his suspicions, and put him upon inquiry, and, consequently, that there was no ground for imputing to him a knowledge that was not proved.

It has, however, been contended, that, admitting that the facts attending the transfer of the note were exactly such as stated by Palmer, we are still bound, by prior decisions, to say that he acquired no title, and could, therefore, pass none to the plaintiff. It appears, it is said, that the note was not received by him in the usual course of his business, and, that the consideration for its transfer was not full, and was usurious, and each of these circumstances, it is insisted, is of itself, a bar to the plaintiff's recovery. We are far from thinking so.

In every action, by a holder for value, of negotiable paper, which has been put into circulation by fraud, it is, doubtless, a proper inquiry, whether the bill or note was taken by him in the ordinary course, not of his own business, but of similar transactions; for, where it appears that the circumstances accompanying the transfer, were unusual, the question, whether they ought not to have awakened his suspicions, and put him upon inquiry, in other words, whether they did or did not amount to constructive notice, must be submitted to the determination of the jury. But it is a mistake to suppose that the protection, which the law extends to a *bonâ fide* holder for value, is limited to a particular class of persons; to those only who deal in negotiable paper, as a part of their regular and ordinary business, such as merchants, bankers and brokers. As we understand the law, the protection of the rule extends to every person to whom negotiable paper may be lawfully transferred; to every person, who, by the payment of value, may acquire a title.

The objection that there was not a full and fair consideration for the transfer of the note in suit, is contradicted by the evidence. If the debt, cancelled by Palmer, is added to the sum which he paid in cash, the amount, it is proved, exceeds the face of the note. The actual satisfaction of a precedent debt, it was decided by this court, in *White v. The Springfield Bank*, (8 Sand. 222,) is

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as truly a valuable consideration as the payment of money, and we think, by a recent decision in the Court of Appeals, this is now established as the law of the state. (*Youngs v. Lee*, 2 Kernan, 552.) But had there been no other consideration proved, for the transfer of the note, than the payment in money, that was made by Palmer, we are not to be understood, as intimating, that the plaintiff would not be entitled to recover. When, in cases like the present, a parting with value is proved, the amount of the consideration is not otherwise important, than as bearing on the question of actual, or constructive, notice. Hence, when usury is not set up as a separate defence, unless it is so gross as to raise the presumption of fraud, the proof of its existence may be justly disregarded. Where an accommodation note is purchased at a rate of discount, exceeding that of lawful interest, the transaction, in judgment of law, is usurious, but the mere fact that it is so, is no evidence of the bad faith of the purchaser; is no evidence that he knew, or suspected, that the holder of the note, from whom he derived his title, had no right or authority to transfer it.

The objection that remains to be stated, is, at first view, more plausible than those that have been considered. The plaintiff, it is said, can have no title to the note, unless it was endorsed by Geissenhainer, the payee, and its endorsement by him is disproved by the evidence. It is true, his name, in his own handwriting, is on the back of the note, but the note was never delivered by him, either to Parker, or to any one, either for value, or for the purpose of being negotiated, and to render an endorsement valid, as passing a title, such a delivery is alleged to be essential. In support of this position, we are referred to several cases, in which the courts, in England, have held that a plea, denying the endorsement of a payee, is sustained by proof that the bill or note, on the back of which his name is written, was never delivered by him, with the intent of passing an immediate title, or an authority to transfer it. The authority of these cases, to which several, not cited by defendant's counsel, might be added, is not meant to be denied, but upon examining them, it will be found that in not one of them was it proved that the plaintiff was a *bonâ fide* holder, for value, and in most of them it is distinctly admitted that, had this proof been given, the defence would not have been allowed to prevail. The doctrine, therefore, which these cases establish, is

this, and only this, that where the non-delivery, by the payee, of a negotiable bill or note is proved, the burden of showing that a valid title was acquired, by its subsequent delivery to a holder, without notice, and for value, is cast upon the plaintiff.

The case, in which the law on this subject seems to have been the most fully considered, is that of *Marston v. Allen*, in the Court of Exchequer, (8 Meea. & Welsby, 494.) The action was against the acceptor of a bill of exchange, which, the declaration averred, had been endorsed by the payee, John Hanop, to one E. Marston, and by him to the plaintiff. The plea denied the endorsement of the payee. Upon the trial, Hanop was called as a witness for the defendant, and, admitting that his name on the back of the bill was in his own handwriting, swore that he had received the bill as the accountant of a bank, to which it belonged, and that he had delivered it to a clerk, one W. Marston, to be kept by him in safe custody for the bank.

E. Marston, the second endorser, was then called as a witness for the plaintiff, and proved that he had received the bill from W. Marston, for value, and that he had endorsed and delivered it, for value, to the plaintiff. To rebut this evidence, the counsel for the defence then offered to show that both E. Marston and the plaintiff had received the bill with full knowledge of the fraud committed by W. Marston, in transferring it. The learned Judge who tried the cause, held that this proof was inadmissible, under the pleadings, and directed the jury to find a verdict for the plaintiff. A new trial was moved for, on the ground that the evidence, so offered, was improperly rejected. The court in bank, after a full argument, being of that opinion, the motion was granted, and a new trial ordered.

Alderson, B., in delivering the judgment of the court, said, (*inter alia*,) "that they had been much pressed with the difficulty that there had been a delivery of the bill to the plaintiff for the purpose of transferring it, and, no doubt, (he added,) had this delivery been *bonâ fide*, and for value, it would have been quite sufficient to give a title to the plaintiff." He then proceeded to lay down the general rule of law, in the words following: "By the law merchant, every person, having possession of a bill, has, notwithstanding any fraud on his part, in acquiring or transferring it, full authority to transfer said bill, but with this limitation, that

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to make such transfer valid, there must be a delivery by him, or by some subsequent holder of the bill, to some one who receives such bill, *bonâ fide* and for value, and is himself either the holder, or the person through whom the holder claims." (Vide, also, *Lloyd v. Howard*, 20 Law Jour. R. (N. S. p. 1;) 1 Law & Eq. R. 227; *Palmer v. Richards*, 1 Law & Eq. R. 529; *Hardey v. Towers*, 4 Law & Eq. R. 531.)

It is obvious that the terms of the rule, thus laid down, were carefully selected, and they plainly embrace the case before us. Parker, notwithstanding his possession and transfer of the note were fraudulent, had full authority to transfer it to a person, receiving it without notice of the fraud, and for value. The evidence shows that it was so received by Palmer, to whom he delivered it, and that Palmer is the person through whom the plaintiff, the present holder, claims.

It follows that the verdict for the defendant is against law and evidence, and must be set aside, and a new trial be ordered; and if, upon the next trial, the evidence shall be the same as upon the first, the jury must be instructed to find a verdict for the plaintiff, for the amount of the note, with interest.

New trial, costs to abide event.

ABRAHAM B. MILLER and others v. NATHAN C. PLATT and others.

An ejectment, to recover a strip of ground, of eleven inches in width, by about twenty-eight feet in depth. The court concluded, that the grantor of the plaintiff had the title, under the conveyances in evidence, and that the jury must so have found, had that been the only question submitted to them.

The plaintiff and defendant were adjoining owners of parcels of ground, derived from a common source of title, by deeds, dated, respectively, in 1828 and 1829.

The strip in question lay between the southerly wall of a hotel, built in 1831, by the grantor of the plaintiff, and the northerly wall of a building, called a bindery, erected subsequently (but in 1831 or 1832) by the grantor of the defendants. But the foundation of the latter wall, below the surface, covered the strip in question, and touched the foundation-wall of the hotel. Above the surface, the wall of the bindery receded, so as to leave the space in question. After being carried up some distance from the ground, the westerly wall of the bindery was built over the space, and touched the wall of the hotel; and, on the easterly side, the wall of the bindery was run across the space. There was some evidence that the roof of the latter building covered the whole of the space in question.

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This space, called an "alley-way," "drain," or "passage-way," had always been used by the occupants of the hotel, from 1831 to 1847. The opening, to the westward, into Theatre alley, was shut by a gate, erected and maintained by them, and the owners of the adjoining lot, under whom the defendant claimed, never claimed a right to the alley, or to any interest therein, during that period. *Held*, that neither the extension of the foundation-wall below the surface, nor the running the wall, in the rear, across the strip, nor the extension of the wall over the drain in front, and the roofing over the whole, though done more than twenty years before the trial, was sufficient to constitute an adverse possession, to divest the plaintiffs' title by deed.

An adverse possession, to constitute a bar, must be an actual and a hostile possession, and not a mere trespass. It involves an assumption of the right to the land in question, from the time it is alleged to have commenced, and a continued holding, with such continued assertion of right. Claim of title, and exclusive claim, is essential to it.

Held, also, that the legal owner of the strip in question, was not estopped from setting up his title, by having suffered the erection of the wall of a new building, upon the space in question, in the manner stated in the case. His non-interference might excuse a trespass, but could not operate to divest and transfer a title.

The cases, upon the doctrine of estoppel, referred to; and the distinction shown between what shall take effect as a license, or take away the character of a trespass, and what shall defeat an estate.

Held, that merely standing by and suffering another to erect a building, or wall, on land, is not effectual, in a court of law, to give a title. That a court of equity may, sometimes, in cases of this nature, be applied to, to protect an innocent party, who has been misled, and expended his money, in consequence of the acts or representations of the owner, when the case amounted to a fraud.

(Before Bosworth and Woodruff, J.J.)

Heard, January; decided, February, 1856.

THE case came up, on the verdict of a jury in favor of the defendants, upon a case made, with liberty to turn the same into a bill of exceptions.

The facts are fully stated in the opinion of the court.

A. H. Dana, for plaintiffs.

E. S. Van Winkle, for defendants.

BY THE COURT. WOODRUFF, J.—This action is brought by the plaintiffs, to recover the possession of a strip of ground, situated upon the easterly side of Theatre alley, in this city, adjoining the southerly or rear wall of the building known as the Clinton Hotel, which fronts upon Beekman street, at the corner of the said alley. Although a larger piece of ground was claimed, in the

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plaintiffs' complaint, it is now conceded, that the controversy, on the trial, was confined, simply, to a space about eleven inches in width, in Theatre alley, and running eastwardly twenty-eight feet, towards Nassau street, between the southerly wall of the hotel, which was built in 1831, and the northerly wall of a building, afterwards erected, in 1831 or 1832, by the trustees of the American Bible Society, grantors of the defendants.

In 1828, the executors of Mrs. Ann White, the former owner of all the ground between Nassau street and Theatre alley, extending from Beekman street southerly of the premises in question, conveyed to Philip Hone the westwardly one half of lot No. 5, upon a map of the property of the said Ann White, and to certain persons, trustees of the Clinton Hall Association, the eastwardly one half of the same lot. On the first of May, 1829, the same executors conveyed to the trustees of the Bible Society, lots Nos. 6 and 7, upon the same map.

It appears, by the map and deeds, that the lots Nos. 5 and 6 adjoined each other, and extended from Nassau street to Theatre alley, and that the line of division is a straight line from the street to the alley.

Soon after these conveyances, the respective purchasers erected buildings upon the premises. Mr. Hone, in 1831, built the Clinton Hotel, fronting Beekman street, and running down the line of Theatre alley, to a line, which is now the northerly boundary of the strip in dispute, not covering his whole lot, but leaving a yard in the interior space, easterly of the building.

It is now claimed, by the plaintiffs, that the building did not, in fact, extend southerly to the line of the lot No. 6, as it might have done, but that Mr. Hone left the narrow strip, of eleven or twelve inches, along the end of the building communicating with the hotel-yard, for a drain, and that it was used as such drain by the occupants of the hotel, and, in some instances, as a passage from the hotel-yard into the alley; and was used or occupied in no other manner, and by no other persons, down to 1847 or 1848, when, in consequence of the construction of a sewer in Beekman street, its use as a drain became unnecessary, and it was then closed up, permanently, at the outer end, on Theatre alley, by a brick wall.

And the plaintiffs insist, that this drain was included in the deed

to Mr. Hone, from the fact of such use and occupation, and also from an alleged necessity to include that within his boundaries, in order to give him the number of feet which the deed purports to convey to him, while, without this strip, the Bible Society have quite as many feet as the deed to the trustees purported to grant; and, especially, because, unless this strip is so included, the southerly line of lot No. 5, and northerly line of No. 6, instead of being a straight line, (as laid down on the map, by which the deeds were given,) after running westwardly, from Nassau street, about seventy feet, turns, at right angles, to the north, across this disputed strip of land, and then is continued to Theatre alley, making what is called a jog, on the northerly line of the defendants' premises, and adding so much, at least, to the width of the lots, as described in the deeds to the Bible Society.

The testimony of the surveyor, Mr. Serrell, was, that Clinton Hall and the hotel were, architecturally, one building, and that the wall of Clinton Hall was built along the whole of their southerly line, i. e., a little over fifty feet, of the seventy feet above mentioned. The hotel-prives were next adjoining, and they appear to have been built upon the same line, continued; and it is only necessary to add the drain in question, to the plaintiffs' premises, to make the line, from the street to the alley, straight and continuous, as it is laid down upon the map, to which the deeds refer, and this, at the same time, leaves to the defendants the full quantity of land described in the deeds, under which they claim.

Upon a careful examination of the case, I am constrained to to say, that the evidence is convincing, that the strip of ground in question, is included in the deed to Mr. Hone, and is not embraced in the conveyance to the Bible Society, and that the jury must, upon the evidence, have so found. If, however, the case had been submitted to the jury upon the mere question whether the premises were embraced in the deed to Mr. Hone, and the verdict had been rendered against the plaintiff upon that point, it might have been difficult to say that the finding was so against the weight of evidence, that it should be disturbed.

But the case was not submitted to the jury upon that question alone.

There was evidence on the part of the defendants, that the building erected by the Bible Society for a book-bindery, on

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Theatre alley, was built in 1831, after the erection of the hotel; that although the northerly wall of that building above the surface of the ground did not cover the premises in question, yet its foundation wall extended underground the whole width of the disputed strip to the foundation of the hotel wall; and that its easterly wall was also extended across the inner or easterly end of the disputed premises; and that its westerly wall, after being raised some seven feet from the ground, was carried across over the outlet of this drain or passage-way to and against the wall of the hotel, and was so carried up to the roof. And that it being thus partially enclosed on three sides, the roof of the bindery was extended over it to the wall of the hotel. Upon a part of these claims there is conflicting evidence, but there is testimony to the effect stated.

There was evidence wholly uncontradicted, that from the time of the erection of the buildings, this strip of ground in question, (called by the witnesses "an alley way," or "drain," or "passage way,") remained as it then was until 1847; that it was always used exclusively by the occupants of Clinton hotel; that it was never used by the Bible Society, nor by any person except such occupants; that its use was as a drain from the hotel, and sometimes persons passed through from the hotel yard to Theatre alley; and that the opening to Theatre alley was provided with an iron gate, and afterwards with a wooden gate, which was maintained by the occupants of the hotel, until 1847 or 1848, when, as above stated, on the construction of the sewer in Beekman street, the opening to Theatre alley was bricked up by the occupants of the hotel.

In view of these and other circumstances testified to, in respect to which there was some conflict, the jury were instructed, that if they were satisfied that the deed to Mr. Hone embraced the premises in dispute, the plaintiffs were entitled to recover, unless they are shut off by an adverse possession or by estoppel, and that in either of these ways the plaintiffs may have lost it, and then the use of the alley gave only an easement to the plaintiffs. And again, if the land belonged to the plaintiffs by deed, the enclosure by the defendants was a sufficient adverse possession, and "if you find that the defendants laid the foundations, built the roof and the front wall, and so took possession more than twenty

years ago, then the plaintiffs, by their use, acquired an easement only."

These instructions assume that the title was in the plaintiffs and not in the defendants, and that the defendants may acquire a title by adverse possession at the same time that the plaintiffs are acquiring a prescriptive title to an easement in their own land. This appears to me paradoxical, and inconsistent with the nature of an easement, as well as with the requisites to an adverse possession. An easement is a right, service, or privilege which a man hath in the lands of another, not in his own lands. The moment he acquires the title, his easement is extinguished. Title to an easement is founded in grant, or that prescription which presumes a grant; can the owner be presumed to grant to himself? And an adverse possession must, I apprehend, be exclusive of the owner.

Taking the facts to which this instruction relates most favorably to the defendants, the defendants' grantors enclose the premises in part, by placing a foundation wall under the surface, erect a wall on three sides, leaving the premises open to the street, some six or seven feet on one of these sides, and extend a roof over the whole, while the remaining, or fourth side is accessible to the real owner, and the passage is in part used, and exclusively used by him, both as a passage and a drain, and the grantors of the defendants not only neither use nor occupy, but have excluded themselves therefrom. I am not able to perceive how the plaintiffs' title can, by such a condition of things, be converted into an easement in another's land; nor how the defendants, in such a case, can gain the title by adverse possession.

The adverse possession which constitutes a bar to a recovery, must be an actual and a hostile possession, not a mere trespass; it involves the assumption of a right to the land from the time such adverse possession is alleged, and a continued holding with the assertion of right, and it must be visible and notorious, and of such a character as excludes the exercise of the ownership by him in whom is the real title; and it must be hostile in a sense that indicates an intent to occupy exclusively.

See authorities collected in notes to *Taylor v. Hurd*, 2 Smith's Lead. Cases, with Am. notes, p. 393-416; *Clapp v. Bromagham*, 9 Cow. 580; *Jackson v. Hill*, 5 Wend. 532; *Id. v. Frost*, 5 Cow.

346; *La Frombois v. Jackson*, 8 Cow. 539; *Smith v. Bunting*, 9 J. R. 174.

The Revised Statutes (2d vol. p. 294) plainly recognize these requisites, and make claim of title exclusive of any other right, essential to constitute such a possession as will bar the owner. I have looked in vain for any evidence that the Bible Society ever claimed title to the premises in question. The defendants' witness, the general agent of the society, since 1836, testifies that the society never claimed any right in it, and no witness states the contrary. Another of the defendants' witnesses, and, indeed, all who speak of its use, state that it was always used exclusively by the occupants of the hotel. It was cleaned by the latter, and the agents of the Bible Society not only did not exercise this act of ownership over it, but complained to the occupants of the hotel, if this was not done by them.

Under such circumstances, I am of opinion that the partial enclosure by the defendants, did not constitute an adverse possession as against the owners of the hotel property, and that the jury should have been so instructed. It is true, that among other things, the jury were told, that if the premises were an open passage connected with the hotel, and used exclusively by them, then the defendants have no claim of adverse possession; but they were also told, that "if there was a foundation under, and a roof over it, and the front enclosed, as the defendants say, as far back as the erection of the Bible House," that was a sufficient adverse possession. In the absence of any other occupation, such an enclosure would undoubtedly constitute a sufficient possession, but to make even this adverse, it must have been taken under claim of title and have been exclusive of the owner, and cannot be adverse while the sole and exclusive occupant of the ground thus partially enclosed by the defendants, is the owner himself.

The other mode in which the jury were instructed the plaintiffs may have lost their title is by estoppel, and in explanation of that subject they were told, that if the defendant acted in good faith in erecting his new building, and if the plaintiffs stood by and allowed him to do it, without notice of their claim, they are not allowed to maintain it now. I am not satisfied that this instruction is correct. It is true that in *The King v. The Inhabitants of Butternon*, (6 T. R. 554,) Laurence, Justice, makes this

observation:—"I remember a case, some years ago, in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land." But I have sought in vain for any other case in England or in this state, in which it has been held that mere silence, when one was erecting a wall upon another's land, estopped the owner to claim the title. It is not only construing silence into a license which would excuse the trespass, but is creating a new kind of assurance, resting wholly in parol, by which real estate is to be divested, and, in effect, conveyed to the occupant.

While the law requires conveyances to be by deed, under seal, or under the solemn form of records, there are estoppels by deed and estoppels by record, which conclude a party from claiming title. But in the face of the statute of frauds, which requires writing, to create or vest any interest in lands, we should be very slow to give to an estoppel *in pais*, (the evidence of which is to rest in mere parol, and to depend upon what the owner said, or even whether he said any thing,) to operate to defeat his otherwise established legal title. For be it observed in this case, that the jury were told that if they were satisfied that the plaintiffs' deed called for this strip of land, the plaintiffs may, nevertheless, have lost it by the estoppel described.

It is doubtless true that, in determining a question of boundary, where the proofs of location, the position of monuments, and other like evidences rest in parol, the admissions of a party are competent evidence; and sometimes, when relied upon by the other party, are, for certain purposes, conclusive; estoppels *in pais* are admissions, and nothing else.

In the cases of *The Trustees v. Williams*, (9 Wend. 147,) and *Dezell v. Odell*, (3 Hill, 215,) in which the nature and effect of an estoppel *in pais* are discussed, the admissions held to estop the party were in relation to matters the proof whereof lay in parol. And so also are the cases in England, *Hearn v. Rogers*, (9 Barn. & Cres. 577;) *Pukard v. Gears*, (6 Ad. & Ellis, 469;) and *Davis v. Wilkinson*, (10, 96, 98.) While, on the other hand, in the *Welland Canal Company v. Hathaway*, (8 Wend. 480,) the admissions contained in the defendant's written contract were held ineffectual to estop him to deny the fact of the plaintiffs' incorporation, or even to dispense with proof, and it was also held, that evidence resting

in records could not be supplied by proof of the admissions of the party. In *Whitney v. Holmes*, (15 Mass. 152,) there was a written agreement by which certain persons were authorized to survey and fix a division line, and the survey and location, in pursuance of that agreement, were held by the court insufficient to operate as a transfer of the title. The court say, no man is barred of his right by way of estoppel but by record or deed. It may operate as a license and protect the defendant for an act which would otherwise be a trespass, for such a license may be by parol. In *Gerrish v. The Proprietors of Union Wharf*, (26 Maine, 13 Shep. 384,) an agreement in writing, not under seal, was held insufficient to estop a party, and the court say, "One cannot be barred by an estoppel of his right to an estate but by deed or record."

Lord Coke in commenting upon Littleton, (§ 667,) wherein it is observed that "a man shall be estopped by matter in fact, though there be no writing by deed indented or otherwise," says, "there be three kinds of estoppels, viz., by matter of record, by matter in writing, as by deed indented, acquittance by deed, or defeasance by deed, and by matter *in pais*, as by livery, by entry, by acceptance of rent, by partition, and by acceptance of an estate."

And in *Brown v. Wheeler*, (17 Connect. 345,) Chief Justice Williams held, that an agreement in writing that partition should be made by three persons designated, an actual division by such persons, and occupation by the parties for eighteen years conformably to such partition, were sufficient, within the rule stated by Lord Coke, to estop each of the parties.

In *Doe v. Rosser*, (3 East. 15,) a submission, under bonds to an arbitrator, and an award in pursuance thereof, concluded the claimant. In *Sheperd v. Ryers*, (15 J. R. 496,) in an action of assumpsit, in relation to the effect of a covenant for a division of land owned jointly, which division should be made by persons therein mentioned, coupled with an award making partition, Thompson, Chief Justice, says, "The partition made by the persons appointed for that purpose, might be considered in the nature of an award of arbitrators, which, though it might not have the operation of conveying the land, might estop the defendant from setting up his title." And the case of *Emans v. Turnbull, et al.*, (2 J. R. 314,) holds an agreement entered into one hundred and thirty-six years before the time of the trial, for the settlement of

a controversy in regard to the title, declaring that the lands specified respectively, should be owned and held by each as therein mentioned, with an occupation in conformity to such agreement, for a period as remote as the memory of witnesses could reach, shall be deemed conclusive, "though deficient in apt terms to pass a fee, the agreement ought to bind, especially after such a lapse of time accompanied by so long an acquiescence." There is certainly no warrant in either of these cases for the proposition that the owner of the fee, by standing by and seeing his neighbors build on his land, loses his title.

It is true that, in *Sayles v. Smith*, (12 Wend. 57,) upon proof, among other things, that the assignor of the defendant, in ejectment, had admitted by parol, that the premises belonged to one Bradley, from whom he had agreed to purchase the same, at the time Bradley took his deed from the former owner, the court say that the defendant is, as one holding under Bradley, estopped to set up a title acquired long prior to Bradley's purchase. But in relation to this case several observations are pertinent. What was said in regard to the estoppel was wholly unnecessary, and the case did not require any decision on the point. Nor, indeed, was it decided at all on that ground, the defendant's title being held divested, and, in truth, vested in the plaintiff, upon other grounds. Again, it is not very clear by the report of the case, what was held to amount to an estoppel, viz., the parol admission that the premises belonged to Bradley, or the agreement which, by parol, he admitted that he made with Bradley. If the former, then there was no propriety in calling it an estoppel, for it does not appear to have come to the ear of, or to have been acted upon by any body interested in the matter; if the latter, then it does not appear that the agreement to purchase was in writing; and to hold a parol admission of a parol agreement an estoppel sufficient to bar a man's legal title, is to give effect to a parol agreement as an estoppel barring a legal claim to land, when, by the statute of frauds, no title nor interest in land can be created by parol. And even if this case be taken as well decided, on the ground that there was an agreement which operated as an inducement to Bradley to take his deed and pay the consideration, upon which assumption alone is there any color for calling this a case of estoppel, it is obvious that such an agreement

presents a very different question from the present; it is upon consideration, and is mutual, and is in its nature sufficient, if valid for any purpose, to create an interest in the land itself. But however that can be viewed, so far as it can be taken to countenance the doctrine contended for in this case, the decision of the same court in *Swick v. Sears*, (1 Hill, 17,) warrants us in saying that it is not law. In the latter case, the defendant in ejectment offered to show that when he purchased the premises in question, the plaintiff not only stood by and saw him purchase, and pay his money therefor, but that the plaintiff advised the purchase and the giving the deed to the defendant, and declared that it would pass the premises and make the defendant's title perfect, and yet the court rejected the evidence on the trial, and the ruling was sustained in the Supreme Court, who held the plaintiff not estopped, in a court of law, to assert his own title, notwithstanding these acts and clear admissions, so unequivocally made with a view to influence the defendant's conduct, and relied upon and acted upon by him. That case is far stronger, and much more fully meets the requisites of an estoppel *in pais*, than the mere silence while a wall was constructed in the present case; and if the former does not bar the claim of title in a court of law, surely the latter will not.

See also, on this subject, the case of *Miller v. The Auburn and Syracuse R. R. Co.*, (6 Hill, 61.)

The rule contended for suggests several inquiries, which, I think, show that it cannot be sustained. If standing by and allowing another to erect a building on one's land, bars the owner's claim, what estate is thereby acquired by the builder? a fee, or a term to cease with the decay or destruction of the building? What kind of a building is it, the erection of which produces this effect? a brick or stone building only, or one of wood also? Is the rule confined to what is in common parlance a building, or will it apply to any erection? and if so, of what height, or depth, of what materials, and of how permanent a construction? Will it apply to a board fence, or a line of stakes driven into the ground?

The proposal of these inquiries seems to me to suggest what there is of real foundation for this supposed rule, viz., where the acts or declarations of the owner have been such as to mislead an

innocent party, who, in a reliance thereon, known to or induced intentionally by such owner, has expended his money in such wise, that to suffer the owner to falsify his own acts or declarations by asserting a title inconsistent therewith, would be to permit a fraud, a court of equity will restrain the latter just so far as is necessary to prevent the fraud and protect the innocent and otherwise defrauded party. (7 Barb. 409, 8 Barb. 102.)

This is, I apprehend, the only foundation for the supposed rule contended for. The court of equity interferes, not upon the ground that the legal title "is lost," as suggested in the present case, but that it is inequitable to permit the party to assert it; and such is the language of the equity cases upon the subject. (*Wendell v. Van Rensselaer*, 1 John. Ch. R. 34.) "If one man knowingly, though passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person; it would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." See numerous cases in equity, cited by Chancellor Kent, to the same effect; and see, also, *Town v. Needham*, (3 Paige, 546.) In *Storrs v. Barker*, (6 John. Ch. R. 166,) the same rule is established in equity, and the suggestion of Lord Mansfield, of the existence of any such rule in a court of law, is questioned. And this view of the rule is conformable to the decision in *Swick v. Sears*, above referred to, in which Mr. Justice Bronson, in giving the opinion of the court upon the effect of the alleged estoppel, says, "If the defendant finds it necessary to rely upon this part of his case, he must go to a court of equity."

The propriety and reasonableness of a resort to a court of equity appears, also, in this, that that court can adapt its restraint to the nature of the act, and to the extent of the danger of fraud, and in that, will regard the nature of the acts, done in reliance upon the admissions complained of. In case of a purchase, they may secure to the purchaser the full benefit of his purchase; (*Niven v. Belknap*, 2 J. R. 573-4; *Hall v. Fisher*, 9 Barb. S. C. R. 81; and *Dennison v. Ely*, 1 Barb. S. C. R. 610;) where a party has entered under a parol agreement for a purchase, and made improvements, equity may enforce the agreement, upon the principles of a part performance. (*Parkhurst v. Van Cortlandt*, 14 J. R. 15.)

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If a building be erected, they may protect the building, so long as it shall stand. If a wall be built, they may allow it to be preserved in its position, or compel the claimant to pay the expenses of its removal. But in neither of these last two cases, is it necessary, to prevent fraud, that the fee should be deemed to be lost to the owner of the land, merely because he has acquiesced in an erection of either a wall or building thereon. In such case a court of law may, perhaps, go so far as to say, that if the owner stands by, and suffers a wall or building to be so erected, he shall not afterwards maintain trespass therefor, but his acquiescence shall be deemed a license; but I am decidedly of opinion, that the court cannot say that his legal title is lost thereby. (7 Barb. 409; 8 id. 102.) If we were now disposing of the question in this case, as a court of equity, taking into view the evidence, that by the qualifications designedly inserted in the deed to the defendant, plainly intimating a doubt of the title of the Bible Society to the land in question, the situation of the strip of land itself, from the use and enjoyment of which the society was excluded by the walls then standing thereon, and especially the evidence that the defendant's agents were informed that the strip belonged to the hotel, we should hardly be able to say, that, by the very slight evidence affecting the plaintiffs, any estoppel, in equity, arose to the prejudice of their title. It is, at least, doubtful whether we should be warranted in saying, that the plaintiffs knew, or had reason to know, that the defendant intended to build on the eleven inches in controversy. To justify the interference of a court of equity, it ought very clearly to appear, not only that the defendant acted in good faith, and without notice, in an innocent mistake, but, also, that the owner knew that he was building upon the very ground in question. (10 Barb. 511; 28 Maine, 525, and cases above cited from this state.)

Without pursuing this inquiry, it must suffice to say, that the interposition of this court, as a court of equity, was in no wise invoked by the defendant. Doubtless, under our present system of pleading, it would be competent for a defendant to set up, by answer, his equitable claims, and if the facts proved were such as clearly to call for an injunction, they would avail to prevent a judgment inconsistent with such equity, and they might, perhaps, avail for this purpose, as a defence, even though that answer con-

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tained no prayer for injunction, or other affirmative relief. But the defendant has here presented no such equitable claim. His defence is based solely upon legal grounds, and this supposed estoppel will not, at law, avail him.

Upon this ground, also, then, a new trial must be granted.

The costs must abide the event.

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When the owner of a bond and mortgage, made by a third person, applies to another to make a loan on the security thereof, but refuses to do so, but purchases them, at less than their face, and takes a transfer which recites a sale, at a sum named, and conveys them in pursuance thereof, the transaction will not be treated as being, in effect, a mortgage, merely because the purchaser gives his covenant to the vendor, to resell them to the latter, within a time named, and on conditions specified.

In the absence of all evidence of the inadequacy of the consideration paid, and of any personal liability of the vendor to refund, in any event, the money received as the price of the transfer, the covenant will be treated as a conditional sale.

(Before OAKLEY, CH. J., DUNE and BOSWORTH, J.J.)

February, 1856.

THIS action came before the court on appeal, by the defendant, from a judgment in favor of the plaintiff. It was tried before Mr. Justice Hoffman, without a jury, on the 16th of February, 1856.

On the 14th of May, 1849, Jas. A. Morse executed to Amos Hogins, a bond for \$800, payable in one year, with interest, and he and his wife executed a mortgage upon real estate in Albany, N. Y., to secure the payment of the money. The mortgage was duly recorded.

On the 16th of July, 1849, Hogins applied to Robert Prince, one of the executors of Abraham Cargill, deceased, for a loan of money, on the security of said bond and mortgage. Prince refused to make a loan, but suggested to Hogins that if he wished to sell the bond and mortgage, absolutely and *bond fide*, for \$500, he would persuade one of the heirs to such estate to buy them. As a result of the negotiations, Hogins, by an instrument of transfer, sold and assigned the bond and mortgage to Prince, as executor, for \$500.

In the afternoon of the same day, Prince executed and delivered to Hogins a paper, reciting such purchase, and containing a covenant to resell them to Hogins on the day they matured, or within two months thereafter, for \$500, and interest thereon, and to allow the amount of any interest the obliger might pay in the mean time, but stipulated that Prince should not be bound to resell, after the lapse of the specified time. Hogins did not repurchase.

In October, 1854, the bond and mortgage were sold to the plaintiff, for \$500, who then paid for the same, but the assignment of them was not executed until the 17th of April, 1852.

On the 27th of May, 1852, the premises were sold, on the foreclosure of a prior mortgage, and bought by A. Mann, Jr., for \$2,150 sufficient to pay the previous mortgage, and the amount due upon the bond and mortgage in question, according to these terms.

The sum which the plaintiff claimed to be then due to him, was \$590.89.

The defendant, who had acquired the equity of redemption, and was, also, a subsequent mortgagee, and was entitled to any surplus there might be, after satisfying the two mortgages, insisted that the transaction between Hogins and Prince was, in legal effect, and in equity, a loan, by Prince, to Hogins, and that, after charging Prince and the plaintiff, as the assignee of his rights, with the sums paid on account of such loan, only \$135.85 was due to the plaintiff.

The defendant executed and delivered to the plaintiff, thereupon, an agreement to pay any sum which, by an action on such agreement, he should establish to have been due to him, at the time of such foreclosure and sale, upon the bond and mortgage in question. This action is brought on that agreement, to have that question adjudicated, and the balance due ascertained.

The whole case turned upon the nature and effect of the negotiations, and transactions, between Prince and Hogins.

Prince was examined at the trial. As his evidence was not substantially varied by the other testimony, it is given entire, so far as it relates to those matters.

Robert Prince testified as follows: Some days prior to the 16th July, 1849, Amos Hogins applied to me, to borrow some money

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on a mortgage he held of \$800 from the estate of Abraham Cargill; I was one of the executors; the other executors were sons of Cargill; I told him there had been arrangements made between the heirs, whereby the three sons were to have the use of the personal property, and the widow the real estate, as that was to be divided; we had no money to loan; he wished to borrow money on this mortgage in question; I told him, if he had a disposition to make a *bonâ fide* sale of the mortgage, and would sell it for \$500, I would persuade one of the boys to buy it, on his agreeing to sell it for \$500 absolutely; I told them they had better buy it, and, on my advice, they agreed; I accordingly drew the assignment in my name, and Valentine Cargill, one of the executors, gave him a check for \$500, on the Seventh Ward Bank. After perfecting the agreement, they did not consider they had any bargain, and I proposed if, in the time the mortgage had to run, Hogins would buy it back for the money and interest, he could do so; they consented to it, and I did it; Hogins is dead; I have never said to any one it was a loan, and I never intended it to be so; Mr. Hogins could not have understood it to be a loan; I expressly told him it was not a loan; I told him, if he wanted to sell it, I would try to find him a purchaser.

Cross-examined.—Hogins first applied for a loan, at his dining-saloon; he spoke two or three times before he got the money; I told him, decidedly, the first time, that he could not have the money; Hogins told me he had lent money to Morse, and Morse had made a poor man of him; had forged checks on him; I did not, at the time I agreed to buy the mortgage, also agree to resell it; the assignment by Hogins was executed in the forenoon; the stipulation to resell it was drawn and signed in the afternoon of the same day; the assignment was executed in Cargill's store in Water street, and was delivered there; the store was in Water, near Beekman street, and Hogins' saloon was in Beekman street, under the Fulton market; the stipulation was drawn in Cargill's store, at the desk; the assignment I drew the day before, at my house; the check was for \$500; I went with Hogins to draw this money from the bank, and he gave me \$25, for my trouble, for selling the mortgage; Morse never paid any money on the bond and mortgage that was not endorsed on the bond; Quirk did not pay me for this bond and mortgage; he gave his note to Valentine

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Cargill for \$500 and interest, all amounting to \$505.84, and payable to Valentine Cargill in two months from October, 1851; the assignment was not given to Quirk till the following spring; I kept the assignment till the next spring; I gave Quirk the assignment when he asked for it; the note was paid to Valentine Cargill, because he was the owner of the bond and mortgage; they were charged to him in the accounts of the executors at \$500; Mr. Quirk now owns the bond and mortgage; the estate of Cargill has no interest.

The court decided, that the plaintiff was the legal owner of the bond and mortgage in question, and that the amount due to him thereupon, on the 27th of May, 1854, was \$590.89, and, deducting the \$135.35, then paid to him, there remained due, for principal and interest, the sum of \$479.10, for which judgment was entered.

The defendant excepted to so much of the decision as "finds that the plaintiff is the lawful holder and owner of the bond and mortgage, mentioned in the complaint herein as belonging to the plaintiff, and that there was due to the plaintiff thereon, on the 27th May, 1854, the sum of five hundred and ninety dollars and eighty-nine cents, and that there is now due thereon the sum of four hundred and seventy-five dollars and eighteen cents, and renders judgment for the plaintiff for that amount, with interest, besides costs," and appealed from the judgment to the General Term.

Mr. Justice HOFFMAN rendered an opinion in support of his decision as follows:—

On the 14th May, 1849, James A. Morse made and delivered his bond and mortgage to Amos Hogins, for the sum of \$800, payable in one year from date, with interest; on the 16th of July, 1849, Hogins transferred and assigned the bond and mortgage to Robert Prince, one of the executors of Abraham Cargill; and on the 17th of April, 1852, Prince assigned the same to the plaintiff. The property was sold upon a foreclosure of an older mortgage. The defendant claimed an interest as subsequent mortgagee; and the question is, how much must be paid out of the surplus purchase money to discharge the mortgage of Moore now held by the plaintiff? The defendant insists that the balance due is only the sum of \$135.35; the plaintiff claims \$479.10. The question depends upon the following instrument and facts:

On the 16th of July, 1849, when Hogins transferred the bond

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and mortgage to Prince, the latter executed to him this agreement:—

NEW YORK, July 16, 1849.

This is to certify, that I have this day purchased, (as one of the executors of the estate of Abraham Cargill, deceased,) from Amos Hogins, a certain bond and mortgage, drawn by James A. Morse and Sarah his wife, in favor of the said Amos Hogins, for the sum of five hundred dollars cash. Now this memorandum is given, to the intent, that should the said Amos Hogins desire to repurchase from me, or either one of the other executors, acting with me as above, the said bond and mortgage, on the day it may arrive at maturity, or within two months thereafter, for the sum of five hundred dollars, and the interest thereon, at the rate of seven per cent., deducting therefrom the interest which may have been paid thereon agreeably to the conditions thereof: in such case, I hereby promise to resell the same to him, for the said sum of money and interest, as above expressed; but I am not bound to resell the same to him, the said Amos Hogins, the said bond and mortgage, unless the above conditions are strictly complied with, within the time herein limited for the repurchase of the same.

Signed and sealed, &c.

Some parol testimony has been taken of what passed at the sale upon foreclosure, on the 27th of May, 1854, and touching the circumstances connected with the execution of the agreement. This evidence, even if unobjectionable, does not vary the case, which must be decided by the written contract. It raises the question, whether there is here a mortgage or a conditional sale.

The leading English cases which I have examined are, *King v. Lees*, 3 P. Wm. 358; *Mellor v. Lees*, 2 Atk. 484; *Goodman v. Giersen*, 2 Ball & Beatty, 274; and *Williams v. Owens*, 10 Simons, 386, and 5 Mylne & Craig, 306. The earlier cases are referred to by Mr. Fonblanque, (2 Tr. Eq. 261, n. s.)

Goodman v. Giersen, (2 Ball & Beatty, 274,) has always been a leading case upon this subject. Lord Manners said, "The fair criterion to decide whether the deed be a mortgage or not, is: Are the remedies mutual and reciprocal? has the defendant all the remedies a mortgagee is entitled to?"

If a foreclosure and sale took place, what remedy would there

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be for any deficiency? There was no covenant or bond, nor would even an implied assumpsit lie. In this case, lands were conveyed in lieu and satisfaction of a portion charged upon them, with a clause of redemption if the portion was paid within ten years. A redemption bill was dismissed. *Williams v. Owens*, (10 Simons, 386, and 5 Mylne & Craig, 306,) is among the latest and most material English cases. The Vice-Chancellor held that the instruments created a mortgage. On appeal, his decision was reversed, and it was decreed that there was only a conditional sale.

The father of the plaintiff was indebted to the defendant in the sum of \$200. By an indenture, of the 14th of June, 1821, it was recited that the said father had agreed to sell to the defendant the premises in question, for the sum of \$550, and the premises were then conveyed, in fee simple, to the defendant, with the usual covenants.

On the same day (14th June, 1821) an agreement was entered into, between the defendant and the father, reciting the conveyance and describing it as an absolute conveyance, and that, upon the treaty for the sale, it was mutually agreed that, in case the father should pay to the defendant the like sum of \$550, within twelve months, and \$13, the expenses of the conveyance, then the defendant would reconvey the premises to the father; and it was provided that, upon such payment, the defendant would reconvey the property, or cancel the former conveyance. The defendant was to retain the rents till the time fixed for the payment, instead of interest, if he preferred this to interest.

The defendant took possession. The plaintiff's father lived for three years after the deed, and the plaintiff was an infant until shortly before the bill was filed. The bill was for a redemption and reconveyance.

Lord Cottenham observed, that the court would treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appeared that the parties intended it to be a mortgage; but it was equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for a repurchase, not acted upon, will not, of itself, entitle the vendor to redeem. He goes through the leading cases, and, among other things, says: "If the transaction was a mortgage, there must have been a debt; but how could Owen (the defendant) have compelled payment?"

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The principal cases in the courts of our own state are, *Robinson v. Cropsey*, (2 Edw. Rep. 138;) *Glover v. Payne*, (19 Wend. 518;) *Holmes v. Grant*, (8 Paige, 243;) *Brown v. Dewey*, (1 Sandf. Ch. Rep. 56, and 2 Barb. Rep. 28;) *Henry v. Davis*, (7 John. C. R. 40;) *Clarke v. Davis*, (2 Cow. 324.)

Assistant Vice-Chancellor Sandford examined the case with great care in *Brown v. Dewey*, and held that there was a mortgage constituted by the documents. Justice Harris, on appeal, reversed the decree, (2 Barb. 28.) In *Henry v. Davis*, chiefly relied upon by the counsel for the defendant, there was an accompanying written agreement to reassign upon payment of the money advanced.

In my opinion, the weight of authority is decidedly in favor of treating the transaction, in this case, as a conditional sale, and I apprehend that the tendency of modern adjudications is, to hold parties more rigidly to the fulfilment of contracts of this character than at an earlier period prevailed.

The amount must be adjusted according to the principles of the plaintiff, and judgment entered for that sum and interest.

The appeal was argued by

A. Mann, Jr., for appellant.

F. W. Burke, for respondent.

BY THE COURT. BOSWORTH, J.—The question in this case is, was the transaction of the 16th of July, 1849, between Hogins and Cargill, a sale of the bond and mortgage made by Morse, or a transfer of them, as security for the repayment of a loan of \$500, and interest?

The instrument, executed by Hogins to Cargill, in terms, sells and transfers the bond and mortgage, absolutely, to the latter.

The instrument, of the same date, executed by Cargill to Hogins, gave him the privilege of purchasing the bond and mortgage, within two months after they fell due, or on or before the 14th of July, 1850, "for the sum of five hundred dollars, and the interest thereon, after the rate of seven per cent, deducting therefrom the interest which may have been paid thereon, agreeable to the conditions" of such bond; but it was expressly declared that such privilege was not to continue beyond that time.

Looking at the terms of the instrument alone, there was first an

absolute sale of the bond and mortgage, and second, a covenant of the purchaser, that he would sell it to Hogins within a period named, but not after that, for the price that had been paid for it, with interest thereon.

Whether this was all that the security might reasonably be supposed to be worth, having reference to the value of the mortgaged property, the amount of prior incumbrances, and the estimated responsibility of the mortgager, we have no means of determining, with much certainty of arriving at an accurate conclusion.

Neither Prince nor Hogins could have anticipated that the bond and mortgage would be paid when they became due, for the privilege, given to Hogins to purchase them, was to continue two months after that time would arrive.

Hogins entered into no contract to pay Prince any part of the \$500, or of the interest thereon, if he should be unable to realize it from the bond and mortgage, or to collect it of Morse.

Prince did not advance his own money, nor was he personally interested in, or to be benefited by the purchase. The money belonged to an estate, of which he was an executor. Before Prince made the purchase, he advised with the persons who would be entitled to the money, and they consented to the purchase being made. Valentine Cargill took the bond and mortgage, at the price which had been paid for them, as so much money, and they were charged to him, in the accounts of the executors.

After the purchase had been made, and the transfer had been executed, Prince, before executing the covenant giving to Hogins a right to repurchase, consulted those entitled to the moneys, belonging to the estate of which he was an executor, and obtained their assent to his giving it.

Hogins never claimed the right to redeem, and Morse never claimed that, by force of that transaction, and of the subsequent conveyance of the mortgaged premises, he was legally or equitably relieved from liability to pay interest on more than \$500 of principal, or to pay less than the whole principal.

The only facts proved to overcome all this, and show that the transaction was a mortgage, and not a sale, are, that Hogins, when he applied to Prince for money, applied for a loan; and that he obtained a covenant, giving him a right to purchase from his vendee, within a time named.

It is admitted that he applied for a loan, but such application was at once repelled. There is nothing to justify the inference, that the money was a loan, or that the transaction was so regarded by the parties at the time, except the naked fact that a loan was applied for. That was refused. And Prince told Hogins, if he would sell it, out and out, for \$500, he would try and persuade one of the boys to buy it.

Unless it is a principle of law or equity, that when a loan is applied for, on the security of a bond and mortgage, made by a third person, and money is received on a transfer of them by an instrument which declares it to be a sale, and which is made in pursuance of a clear agreement to sell, it is necessarily a mortgage, provided the person advancing the money subsequently, and on the same day, agrees to resell them to his vendor, within a time named; then it will be difficult to assign any satisfactory reason for reversing the judgment appealed from.

In *Brown v. Dewey*, (1 Sand. Ch. R. 78,) Vice-Chancellor Sandford assented to the proposition, acted upon in other adjudged cases, that the absence of a personal liability, as in this case of Hogins, for the repayment of the \$500, and interest, is a strong circumstance in favor of holding the paper executed by Prince, a contract to sell, instead of holding the transaction a mortgage. That such a circumstance, in connection with the adequacy of consideration, would have been controlling with him, in that case, were it not for certain strongly marked features that appeared in it. These features were, first, the reservation of \$175, annual interest, while the annual rent of the land conveyed was not worth over about \$115; second, an agreement of the grantor, to expend annually, besides paying such interest, \$50 in permanent improvements upon the premises; and third, taking a note of the grantor, with a surety, in the sum of \$200, as a security that the grantee should receive, at the end of five years, \$300, in addition to the \$2,500 he had advanced, and the interest thereon.

No such marked features are found, in this case, to rebut the effect deemed to be due to the fact, that Hogins was not personally liable to repay principal or interest, and to the absence of evidence to show that the consideration paid, was clearly inadequate.

It may be true, as was contended on the argument, that a person may mortgage property to secure the payment of a sum of

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money, without being personally liable for the payment of such money: that is, it may be true that a party executing an instrument, which is in terms a mortgage, to secure the payment of a sum named, if it contains no covenant to pay, nor acknowledges the existence of a debt, may not be liable on an implied covenant, to pay in the absence of an actual agreement to pay. But although this may be so, it is not obvious on what principle that consideration can aid the defendant in this case in arriving at the conclusion, that the instruments in question amount, in the intendment of the parties and in equity, to a mortgage, or render the fact of the absence of all personal liability of Hogins, to pay any portion of the sum advanced to him, less significant in this case, than it has been uniformly held to be, in similar cases which have been the subject of adjudication.

The principal authorities bearing on the question presented, are cited in the opinion of the Judge who tried this action at Special Term, and we agree with him, that they sustain the proposition, that this transaction, upon the facts and circumstances disclosed by the pleadings and proofs, was a conditional sale, and not a mortgage.

The judgment appealed from must be affirmed.

CHARLES G. STEARNS v. JOHN TAPPIN, impleaded with H. G. COGGESHALL.

The provision in the Revised Statutes, permitting an inquiry into the consideration of a sealed instrument, has not altered the rule of the common law, that a release under seal, although reciting only a nominal consideration, extinguishes the debt to which it relates.

Parol evidence, to contradict the terms or legal effect of such a release, is inadmissible, and hence, evidence to show that it was founded upon any other consideration than that which it states must be rejected.

But where the consideration of the release is nominal, the moral obligation to pay the debt remains, and is a sufficient consideration for a new promise of payment. The effect of such a promise, however, is not the same as that of a promise to pay a debt barred by the Statute of Limitations. It creates a new debt, and in an action for the recovery of the debt, the promise by which it was created, must be stated in the complaint as the cause of action.

When the debt released was evidenced by a negotiable note, a promise of payment

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to the payee does not enure to the benefit of a subsequent endorsee, for as the release extinguishes the note, its subsequent transfer is wholly void.
Judgment for defendants, dismissing complaint, with costs.

(Before OAKLEY, CH. J., and DURN, J.)

February 7, 1856.

THIS was an action by the plaintiff as endorsee, against the defendants as makers of a promissory note, dated Nov. 24, 1845, for the sum of \$980.39, payable two months after date, to the order of Clarke & Co., signed by the defendants in their partnership name of Coggeshall & Tappin, and endorsed, without recourse, by the payees, to the plaintiff.

The defence in the answer of Tappin, who alone appeared, was the Statute of Limitations and a release.

The cause was tried before Campbell, J., and a jury, in May, 1855.

The plaintiff produced, and read in evidence the note in question, and rested.

The defendants then produced and read in evidence, after due proof of its execution and delivery, and that Samuel J. Clarke, by whom it was executed, was a partner in the firm of Clarke & Co., the payees of the note, the following release:—

“In consideration of the sum of one dollar to me in hand paid, by John Tappin, of the late firm of Coggeshall & Tappin, of the city of New York, I do, on behalf of the firm of Clarke & Co., of New Haven, Connecticut, hereby release, quit-claim, and forever discharge the said Tappin of and from all his debts, dues, claims, and demands, which the said firm of Clarke & Co. have against said Tappin as a member of the late copartnership firm of Coggeshall & Tappin.

“Dated September 18th, 1850.

(Signed) “SAMUEL J. CLARKE.” [L. S.]

The plaintiff then offered to prove, by Samuel J. Clarke, that he executed the release at Tappin's request; that nothing was paid or offered to be paid by Tappin as a consideration for giving such release, but that Tappin promised him if he would execute the release, he (Tappin) would positively pay the note at the expiration of two years from that time, (the date of the release;)

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and that on that promise, and for no other consideration, he (the witness) executed the release; that at the expiration of two years the witness called again with the note upon Tappin, in the city of New York, for payment; that Tappin said he could not pay it then, but would pay it at the expiration of another year; that witness called on Tappin again for payment, in the fall of 1853, when Tappin promised him that he would positively pay him the note in six weeks; and that Tappin had, in several other instances since the date of the release, when applied to by witness for payment, unqualifiedly promised to pay it.

To all of which evidence so offered on the part of the plaintiff the defendants' counsel objected. The court allowed the objection, and ruled, that it was not competent for the plaintiff to prove the facts so offered to be proved on his part. To which decision of the court the counsel for the plaintiff excepted. And thereupon the plaintiff's counsel rested the case.

And thereupon the court, on motion of the defendants' counsel, ordered the complaint to be dismissed; and further directed that said exceptions be heard in the first instance at a General Term of this court, and that the judgment in this action be in the mean time suspended, and the motion for a new trial made herein on said exceptions be heard, and may be brought on for argument by either party, at a General Term of this court.

E. Seely, for the plaintiff.

The Judge erred in excluding the evidence that was offered, and we are, therefore, entitled to a new trial. The evidence would have been a full answer to the plea of the statute of limitations; and as to the release, it was void for want of a sufficient consideration. Since the Revised Statutes, (2 R. S. 564,) a seal is only presumptive evidence of such a consideration, and the proof would have repelled the presumption. But admitting the release to be good, the promise of Tappin to pay the debt was founded on a sufficient consideration; it was binding on him, and enured to the benefit of the plaintiff as endorsee of the note. As to the alleged variance between the proof offered and the complaint under the Code, it ought to have been disregarded as immaterial. The counsel

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cited, 1 Parsons on Contracts, 357 ; 12 Sergt. & Rawle, 384 ; 25 Wend. 384 ; *Cutlin v. Gunter*, 1 Ker. 398, and other authorities.

E. W. Sloughton, for defendants.

The release was an absolute bar to any claim upon the note ; for a release by one partner, of a partnership debt, is binding upon all. (3 John. 68 ; 14 John. 387.) The counsel for the plaintiff is mistaken in supposing that this is like the case of a debt barred by the Statute of Limitations ; and that, after the release, there remained a moral obligation, which was a sufficient consideration for the promise of Tappin. The release extinguished the debt, and left no obligation of any kind to pay it, and hence the promise offered to be proved was without any consideration and wholly void. As to the release, parol evidence that it was without consideration, or was founded upon any condition or promise whatever, was inadmissible, and this all the cases show. (*McOrea v. Purmort*, 16 Wend. 460.) The complaint was properly dismissed, and the defendant is entitled to judgment.

BY THE COURT. OAKLEY, CH. J.—Whatever may be the true construction of the provision in the Revised Statutes, which permits an inquiry into the consideration of a sealed instrument, it has, assuredly, never been construed, nor do we think that it can reasonably be construed, as altering the rule of the common law, by which a release under seal operates, *per se*, as an extinguishment of the debt to which it refers ; and although liable to be avoided by proof that it was obtained by fraud or duress, is not open to contradiction by parol evidence. There is a wide distinction, as Mr. Justice Cowen, in delivering the judgment of the Court of Errors, in *McOrea v. Purmort*, (16 Wend. 474,) has well shown, between a release and a receipt. The first, by its own operation, extinguishes a pre-existing right, and therefore cannot be contradicted or explained by parol ; the second, has never the effect of destroying a subsisting right, but is merely evidence of a fact,—the fact of payment,—and therefore, like all other facts given in evidence, may be refuted or explained. But the construction of a release that has here been contended for, would abolish this distinction. According to this construction, every release which, like that be-

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fore us, is founded upon a merely nominal consideration, would be void upon its face ; and every release founded upon a pecuniary consideration, less in amount than the debt it purports to discharge, would be void as to the balance it admits to be unpaid. That this would be contrary not only to the understanding of the bar, but to the uniform practice in our courts of justice during the long period that has elapsed since the Revised Statutes have been in force, must be known to all who have any experience in our profession. We doubt whether a single case has occurred in which a release, admitted in evidence as unquestionably valid, has been founded upon the actual and full satisfaction of the debt to which it related.

We have, therefore, no difficulty in holding that the release now in question, although it states only a nominal consideration, was operative and valid ; and that its legal effect was to extinguish the debt and the note, as evidence of that debt, upon which this action is founded.

It follows, necessarily, that the proof that was offered, so far as it tended to show that the release was founded on any other consideration than that which it states, as contradicting both the terms and the legal effect of the instrument, was properly rejected. The offer to prove that, prior to the execution of the release, and as a consideration for its execution, Tappin promised to pay the note within two years, was plainly of this character.

The only questions, then, are, whether the defendant, Tappin, was bound by his subsequent promises to pay the note ; and if so, whether, under the pleadings, evidence of these promises could properly be received, to warrant a recovery by the plaintiff in the present action.

We shall concede, without meaning to affirm, that when the consideration of the release of a debt is nominal, or less than the sum confessed to be due, the moral obligation of the debtor to pay the debt, or the residue of the debt, is exactly the same as that of a debtor who has obtained a discharge under a bankrupt or insolvent law, in which cases, it is fully settled, that the moral obligation is a sufficient consideration for a subsequent promise of payment. We shall concede that the legal effect of the promise, in all the cases, is the same, and our decision will be governed by the analogy that we thus admit to exist.

What, then, is the legal effect of the promise of a debtor to satisfy a debt from which he has been wholly discharged by the operation of a bankrupt or insolvent law? If the effect is the same as that of a promise to satisfy a debt, barred by the Statute of Limitations, it cannot be denied that the proof that was offered upon the trial ought to have been received, and if given, would have entitled the plaintiff to recover. A promise to pay a debt, barred by the statute, revives the debt; and when the evidence of the debt is a negotiable note, which is subsequently transferred, the promise, although made to the payee, enures to the benefit of the holder, and may be proved by him in an action, in which no other cause of action is stated in the declaration or complaint than the note itself.

But when the promise of the debtor is to pay a debt that has been extinguished—a debt from which he has been wholly discharged—and whether by force of a legal proceeding, or by the voluntary act of the creditor, must be immaterial, the legal effect and legal consequences of the promise are substantially different. The promise does not, then, revive the original debt, nor, where the evidence of that debt is a negotiable note, does it enure to the benefit of a subsequent endorsee. The promise is then a new contract, creating a new and distinct cause of action; and in an action upon this contract, proof of the original debt is not otherwise important than as necessary to raise the moral obligation, which is the true consideration of the promise, and alone gives it validity.

The reasons for this distinction may not be obvious, and, when stated, may be thought technical or refined; but the cases are numerous in which they have been recognized and followed, and it may be said with truth, that no distinction is more clearly and fully established. The reasons upon which it is founded are, that the Statute of Limitations acts, not upon the contract, but upon the remedy alone. The debt subsists, although the right to maintain an action for its recovery, for the time, is gone. Hence, when a new promise has removed the bar that the lapse of time had alone created, the payment of the debt, as the original cause of action, may be again enforced. But the discharge of a debtor, under a bankrupt or insolvent law, and just as certainly by a release, acts upon the contract itself, and puts an end forever to the obli-

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gation that it created. Hence it is a new debt that, in these cases, the new promise creates; and it is upon the promise, as a distinct and original agreement, that the action of the creditor, who seeks to enforce it, must be founded. It is owing to this distinction that, while an insolvent law, applicable to existing debts, as impairing the obligation of contracts, is unconstitutional and void, a law which, in relation to such debts, only shortens the period of limitation, as affecting the remedy alone, is constitutional and valid. (*Sturges v. Crowninshield*, 4 Wheat. 122; *Hetch v. Hotchkiss*, 7 John. C. R. 296; *Dean v. Hewitt*, 5 Wend. 262; 2 Esp. R. 936; *Cowper*, 544; *Douglas*, 192.)

What, then, are the consequences of this established distinction, in their application to the case before us? They are these, that as the discharge or release of a debtor, by annulling the contract, extinguishes the debt, so when a negotiable note is the evidence of the debt, it extinguishes the note. It destroys forever its negotiability, and renders its subsequent transfer wholly void. As a subsequent endorsee acquires no title, he can maintain no action upon the note itself; and, unless the new promise, creating a new debt, was made to himself, he can maintain no action upon the promise, which cannot follow, as an incident, a note that has ceased to exist.

I shall refer to two or three decisions of our former Supreme Court, as sustaining and illustrating these positions.

The action in the case of *Depuy v. Swart*, (8 Wend. 135,) was brought by the plaintiff, as the holder, against the defendant, as the maker of a promissory note, payable to A. Robinson or bearer, and the defence was, the discharge of the defendant under the act then in force, granting relief in cases of insolvency. To meet this defence, the discharge having been proved, the payee of the note was called as a witness upon the trial, and proved, that the defendant, shortly after his discharge, and repeatedly thereafter, while he (the witness) was the holder of the note, and before its transfer to the plaintiff, had promised to pay the debt. The evidence was objected to, but was received by the Judge, who directed the jury to find a verdict for the plaintiff.

The case was before the court in term, upon a motion to set aside the verdict, and for a new trial; and the court, holding that

the plaintiff had no right to maintain the action, granted the motion.

Marcy, J., who, in a singularly able and lucid opinion, delivered the judgment of the court, after referring, as an authority, to an express decision of the Supreme Court of Massachusetts upon the same questions, (*Baker v. Wheaton*, 5 Mass. R. 509,) arrived at the conclusion, that the discharge of the defendant discharged the debt for which the note was given, and by destroying the legal existence of the note, put an end to its negotiable qualities; that the plaintiff had, therefore, acquired no right, from the transfer to him, to maintain an action upon the note, and that an action upon the new promise of the debtor could be maintained only in the name of the creditor to whom it was made. Exactly the same question arose in the subsequent case of *Moore v. Videle*, (4 Wend. 420,) and the court, reaffirming its decision in *Depuy v. Swart*, held, that the negotiability of the note, upon which the suit was brought, was destroyed by the discharge of the maker under the insolvent act, and that its subsequent transfer gave no right to the person receiving it to maintain an action upon the note.

In the subsequent case of *Dean v. Hewitt*, (5 Wend. 257,) the action was by the endorsee against the maker of two promissory notes. The defence was, that the Statute of Limitations had attached, and this defence was overruled upon the trial by evidence of a new promise of the defendant made to the payee of the notes, before their transfer to the plaintiff, and within six years before the commencement of the action. The plaintiff, under the direction of the presiding Judge, obtained a verdict, which the court at General Term refused to set aside, and I refer to the decision as showing the existence and legal consequences of the distinction that has already been stated and explained. The counsel for the defendant, in moving for a new trial, relied upon the decision in *Depuy v. Swart*, and contended that it was just as applicable to a new promise to pay a debt, barred by the statute, as to a similar promise to pay a debt, barred by an insolvent's discharge, insisting that, in both cases, the new promise is the true and sole cause of action, and should be declared on as such. The court thought otherwise, holding, that the statute applies to the remedy alone, and that it is this that the new promise continues or revives;

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and Marcy, J., who again delivered its judgment, said, "that a demand, the remedy for the recovery of which has been continued or revived by a new promise, is precisely the same as before the statute had attached, and when it is evidenced by a negotiable instrument, the negotiability of the instrument is coexistent with the demand," evidently meaning, that, in this case, the promise that revives the remedy, follows, and is attached to the instrument, and enures to the benefit of its holder.

It is needless to point out the exact resemblance between the evidence that was improperly received in the case of *Depuy*, and that which was offered and rejected in the case before us. It is manifest, that there is no other distinction, than that which exists between the extinguishment of a debt by a legal proceeding, and its extinguishment by the voluntary act of the creditor. It was the actual extinction of the original debt, however, that, in the cases of *Depuy v. Swart* and *Moore v. Viele*, was the sole ground of the decision, and hence, where that extinction is proved, it is plainly immaterial by what means it was effected. By whatever means it may be effected, its legal consequences must be the same. Hence, if the plaintiff, in each of those cases, had no right to maintain the action, by availing himself of a promise made to the payee of the note in suit, before its transfer to himself, it seems to us a necessary conclusion, that no such right can be held to have been acquired by the plaintiff in the present action. As the proof offered would not have shown, that the transfer of the note gave him the right, it was properly rejected.

It is true, that the cases of *Depuy v. Swart*, and *Moore v. Viele*, were decided before the Code was enacted, and, consequently, when a new debt, created by a new promise of a discharged debtor was not assignable, so as to enable an assignee to maintain an action, in his own name for its recovery; and this circumstance, it may be said, creates a distinction, that renders the decisions, in those cases, no longer applicable as authorities. But we do not think so. There is no intimation in either of the cases, that in the opinion of the court, the plaintiff, by the transfer of the note in suit, had acquired an equitable title to the new debt, which the promise of the defendant had created, so as to entitle him to bring an action for its recovery, in the name of the payee to whom the promise was made. There is no intimation, that a transfer, that

the court held to be void, was yet effectual to pass the debt. Although, since the Code, the assignee of a debt, no matter how or when created, may maintain an action, in his own name, for its recovery, we do not at all understand, how the attempt to transfer a debt, that had ceased to exist, can be received as evidence of the assignment of a debt subsequently created. The transfer, if void at all, is void altogether. We have seen that a debt created by the new promise of a discharged debtor, is not an incident of a negotiable note, by which the original debt was evidenced, but is a substantive and independent cause of action, and we are, therefore, clearly of opinion, that it is only by a distinct and independent act, expressly referring to the debt thus created, that it can be assigned or transferred.* In this case, no such assignment was offered to be proved, or is pretended to have been made.

But had proof of such an assignment been offered or given, it seems to us certain that it would not have enabled the plaintiff to recover in the present action. As the debt created by the promise of a discharged or released debtor, although founded on his moral obligation to pay a former, is a new and substantive cause of action, it must be stated as such in the complaint, whether the action is brought by the creditor to whom the promise was made, or by his assignee. Here, there is no such statement in the complaint, for the action is brought by the plaintiff, not as assignee of a subsisting debt, but as endorsee of an extinguished note. His title to the note is the only cause of action stated in the complaint.

It has, indeed, been insisted, that if the plaintiff was entitled to the benefit of the promises made by the defendant to the payees of the note, the variance that would have arisen from the proof that was offered, might, under the provisions of the Code, have been justly disregarded. We cannot so hold. The only cause of action alleged in the complaint, was disproved, in its entire scope and meaning, (Code, § 191,) and the proof offered, if effectual for any purpose, would have substituted a new cause of action, which the defendant had not been required to answer, and to which the defence, in his answer, was not at all directed. Even, if the proof

* Vide note of editor to the case of *Depuy v. Swart*, (9 Wend. 2d ed. 241,) where an opposite opinion as to the effect of a transfer of a negotiable note, since the Code, appears to be expressed.

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would have shown a right of action in the plaintiff, the Judge, under the pleadings, had no power to receive it, nor, as we think, without the consent of the defendant, could he have amended the pleadings for the purpose of its reception.

Although, as the case stood upon the trial, the jury might very properly have been instructed to find a verdict for the defendant, the Judge committed no error, which the plaintiff can allege, in dismissing the complaint, and a judgment dismissing it, with costs, must, therefore, be entered.

Judgment accordingly.

VANDERBILT v. MATHIS.

To maintain an action for malicious prosecution, three facts, if controverted, must be established:

1. That such prosecution was determined in favor of the plaintiff, before the action was commenced.
2. The want of probable cause.
3. Malice.

The determination, in favor of the plaintiff, of the prosecution alleged to be malicious, is not, *per se*, *prima facie* evidence of the want of probable cause.

The proof of malice is as essential as that of the want of probable cause. But the latter may be shown, without the existence of malice being either a consequence or concomitant. Malice, in fact, must be proved, either by direct evidence, or by circumstances connected with, or growing out of, the proof of a want of probable cause, justifying the inference of it, as a fact thus proved.

There is no theoretical malice, which can satisfy the rule requiring proof of malice, and which can coexist with the established fact, that the prosecution was instituted in an honest belief of the plaintiff's guilt, and with no other motives than to bring a supposed offender to justice.

The question of actual malice may be a turning point in an action of this nature. In such a case, it must be determined by the jury, as a question of fact, and such evidence of its existence must be given as will justify a jury in finding it, as a fact proved.

(Before OAKLEY, CH. J., DUER and BOSWORTH, J.J.)
February, 1856.

THIS action came before the court, on questions of law arising at the trial, and which were there ordered to be heard in the first instance by the General Term.

It was tried before Mr. Justice Slosson, and a jury, in June, 1855.

The action was brought to recover damages, on the allegations that the defendant, on the 27th of November, 1854, before R. E. Stilwell, a commissioner of the United States for the southern district of New York, falsely, maliciously, and without any reasonable or probable cause, complained and charged that the plaintiff had theretofore committed perjury, by falsely and corruptly swearing that he was the true and only owner of a certain steamship, called the *Adelaide*; that, upon such complaint and charge, the plaintiff was arrested and brought before the said commissioner, and, afterwards, upon an examination of the matter, was fully acquitted and discharged.

The questions decided by the General Term, relate solely to exceptions taken to the charge of the Judge, and to his refusal to charge as requested.

Hence, as the charge is of considerable length, only those portions of it are stated which show the matters excepted to. The Judge, among other things, charged as follows:—

"That, in order to enable Vanderbilt to maintain his action, he must prove:

"1. The prosecution by the defendant, the plaintiff's arrest, and that the prosecution is ended, and the plaintiff discharged therefrom.

"2. That the prosecution was undertaken by the defendant without probable cause.

"3. That the defendant acted maliciously in the prosecution."

* * * * *

"If the facts show that there was not probable cause for the defendant's prosecution, then malice may be inferred.

"The evidence is, that the plaintiff was discharged before the magistrate. This shows *prima facie*, that there was no probable cause for the arrest, and shifts the burden of proof from the plaintiff to the defendant, who is bound to show, affirmatively, that there was probable cause. The actual state of the facts, apart from the defendant's knowledge and belief of them, is not the test of probable cause. You must be satisfied that the defendant knew of the existence of the facts on which he relies to show probable cause.

"His charge was, that the plaintiff made a false oath, in swearing that he was the owner of the vessel, and the burden is with him to show that there was probable cause for this charge, and he can show it only by showing his knowledge of facts and circumstances, which would justify a reasonable and cautious or prudent man in believing that the plaintiff was not the owner."

* * * * *

"On this question of malice in fact, you will also take into consideration the defendant's conduct on the arrest of the plaintiff, whether or not there was unnecessary zeal and activity or eagerness on his part, all which has a bearing on the question of motive.

"This question of malice in fact, supposing that probable cause did not exist, is material only as affecting the question of damages; and on the question of damages, the plaintiff, if entitled to recover at all, is entitled to indemnity for the deprivation of his liberty and for the injury to his reputation, feelings and person, and also for the expenses to which he has been necessarily subjected."

The counsel for the defendant said he excepted to that part of the charge in which it was said, that the discharge by the commissioner was *prima facie* evidence of want of probable cause.

The defendant's counsel also asked the court to charge, "That the discharge of Vanderbilt was not *prima facie* evidence of want of probable cause." The court refused to charge, except as it had before charged, and the defendant's counsel excepted to such refusal.

The defendant's counsel then asked the court to charge, "That if the jury believe from all the evidence in this case, that the defendant acted in good faith in making the complaint, this action cannot be maintained." The court refused to charge, except as it had before charged, and the defendant's counsel excepted to such refusal.

The defendant's counsel then asked the court to charge, "That the jury cannot find a verdict for the plaintiff unless he has proved that there was no probable cause for the complaint, and not even then, unless they believe from the evidence that in making the complaint the defendant acted from malicious motives." The court refused to charge, except as it had before charged, and the defendant's counsel excepted to such refusal.

And the jury afterwards returned a verdict for \$1,000.

And the court thereupon ordered, that the defendant have twenty days to make and serve a case, with leave to turn the same into a bill of exceptions or special verdict, and that the same be heard, in the first instance, at the General Term; and that, in the mean time, all proceedings on the part of the plaintiff be stayed.

L. B. Shephard, for plaintiff.

J. T. Williams, for defendant.

BY THE COURT. BOSWORTH, J.—To maintain an action for malicious prosecution, three facts, if controverted, must be established:—

1. That the prosecution is at an end, and was determined in favor of the plaintiff.
2. The want of probable cause.
3. Malice.

In such an action, it is necessary to give some evidence of the want of probable cause. It is insufficient to prove a mere acquittal; that, alone, is not *prima facie* evidence of the want of probable cause. (*Gorton v. De Angelis*, 6 Wend. 418.)

It is equally essential, that the former prosecution should appear to have been maliciously instituted. Malice may be inferred from the want of probable cause, but such an inference is one which a jury is not required to make, at all events, merely because they may find the absence of probable cause.

Unless the evidence, in relation to the circumstances under which the prosecution was ended, and that given to establish the want of probable cause, justify the inference of malice, other evidence, in support of it, must be given.

Evidence as to the conduct of the defendant, in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publication, are properly admitted to prove malice. Such evidence must be given as will justify a jury in finding the existence of malice.

The rule is uniformly stated, that, to maintain an action, for a former prosecution, it must be shown to have been without probable cause, and malicious. (*Vanduzer v. Linderman*, 10 J. R. 110;

Murray v. Long, 1 Wend. 140, 2d Stark. Ev. 494; *Willans v. Taylor*, 6 Bing. 173.)

The Judge, at the trial, charged, that the fact, that the plaintiff was discharged before the magistrate, showed, *prima facie*, that there was no probable cause for the arrest, and shifted the burden of proof from the plaintiff to the defendant, who was bound to show, affirmatively, that there was probable cause.

He was requested to charge, "that the discharge of Vanderbilt was not *prima facie* evidence of the want of probable cause." This he refused to do. To this refusal to charge, and to the charge as made, the defendant excepted.

He also charged, "that, if probable cause is made out, the question of malice becomes immaterial, except as bearing on the question of damages."

"This question of malice, in fact, supposing that probable cause did not exist, is material only as affecting the question of damages."

He was requested to charge, "that the jury could not find a verdict for the plaintiff, unless he has proved that there was no probable cause for the complaint, and not even then, unless they believe, from the evidence, that, in making the complaint, the defendant acted from malicious motives." This the Judge declined to do, and to his refusal to so charge the defendant excepted.

Although the evidence which establishes the want of probable cause may be, and generally is, such as to justify the inference of malice, yet we understand the rule to be, that when it is a just and proper inference from all the facts and circumstances of the case, upon all the evidence given in the cause, "that the defendant was not actuated by any improper motives, but only from an honest desire to bring a supposed offender to justice, the action will not lie, because such facts and circumstances disprove that which is of the essence of the action, viz., the malice of the defendant in pressing the charge."

In *Bulkeley v. Smith*, (2 Duer, 271,) the court stated the rule to be, "that, in order to maintain a suit for a malicious prosecution, the plaintiff is bound to prove the entire want of a probable cause for the accusation, and the actual malice of the defendant in making it. Malice is a question of fact, which, when the case turns upon it, must be decided by the jury."

Story, J., in *Wiggin v. Coffin*, instructed the jury that two things must concur, to entitle a plaintiff to recover in such an action:

"The first is, the want of probable cause for the prosecution; the second is, malice in the defendant in carrying on the prosecution. If either ground fail, there is an end of the suit."

In *Vanduzer v. Linderman*, (10 J. R. 110,) the court said: "No action lies, merely for bringing a suit against a person, without sufficient ground. To maintain a suit for a former prosecution, it must appear to have been without cause, and malicious."

If the charge must be understood to mean, that if the want of probable cause was established, the plaintiff was entitled to recover, although the jury should believe, from the whole evidence, that, in making the complaint, the defendant did not act from malicious motives, then we deem it to be erroneous. This construction is the only one, of which the language of the instruction appears to be susceptible; for the Judge, in charging the jury, stated that the "question of malice in fact, supposing that probable cause did not exist, is material only as affecting the question of damages."

Malice in fact, is that kind of malice which is to be proved. When malice may be, and is inferred, from the want of probable cause, it is actual malice which is thus proved.

There is no theoretical malice which can satisfy this rule, and which can coexist with the established fact, that the prosecution was instituted in an honest belief of the plaintiff's guilt, and with no other motives than to bring a supposed offender to justice.

The question of malice may be a turning-point of the controversy, in an action of this nature.

The want of probable cause may be shown, and yet, upon the whole evidence, in any given case, it may be a fair question for the determination of a jury, whether the defendant was actuated by malice. If the whole evidence is such, that a jury cannot properly doubt the honesty and purity of the motive which induced the former prosecution, and if they fully believe that it was instituted from good motives, and in the sincere conviction that the plaintiff was guilty of the offence charged, and without malice, the defendant would be entitled to a verdict.

The charge made, and which was excepted to, must be deemed to have been made, to give the jury a rule of action, in disposing of the case upon the whole evidence. We think it was not only calculated to mislead, but was erroneous.

A new trial must be granted, with costs to abide the event.

WILLIAM NELSON and others v. AUGUSTUS BELMONT.

A vessel, bound from New Orleans to Havre, was struck by lightning and set on fire. Her cargo consisted of cotton chiefly, some staves, and eight kegs of specie. A passing Danish brig was induced to stay by her, while efforts were made to put out the fire. Holes were cut in the deck, and water poured down, but ineffectually, and they were stopped to stifle the flames. The next day, it was found necessary to put into a port of distress, and the brig was engaged to accompany her, and the passengers and specie were removed to the brig. No bargain was made as to compensation. The two vessels arrived at Charleston, when the fire-engines of the city were employed. The vessel was filled with water, and sunk to the upper deck. After that, she was pumped out, and the cargo discharged. The captain, without advice, abandoned the voyage, and sold the cotton at Charleston. He made some slight repairs to the vessel, by his own carpenter there, and brought her to New York, where repairs to a large amount were put upon her.

While in the harbor of Charleston, and before reaching the wharf, the captain obtained the specie from the Danish brig, and deposited it in a bank.

Certain sums were allowed to the captain of the Danish vessel, and to the fire-companies, under the sanction of the Chamber of Commerce in Charleston.

Upon revising an adjustment of the general average, made in New York—

Held, 1st. That the specie on board the Galena, and which was transferred to the Danish brig, was liable to contribute, in common with any other portion of the cargo, to whatever may be a proper subject of general average.

2d. That the amount awarded to the Danish brig, for her services in going into Charleston with the Galena, was to be allowed.

3d. The amount awarded by the Chamber of Commerce to the fire-engine company was also proper.

4th. The damage to the vessel, occasioned by cutting the holes in the deck, when at sea, to pour down the water—that is, the mere expense of repairing the deck where these holes were cut, was to be allowed as a proper item for contribution.

5th. The damage caused to the vessel by the swelling of the cargo—that is, the amount which can be distinctly shown it would cost to repair that specific damage, was also proper.

6th. That any loss to the cargo, which it can be distinctly shown arose, exclusively, from damage done by the water, the cargo not being on fire at the time, was to be allowed.

7th. The freight was improperly allowed by the adjusters. It is neither to be contributed for, nor to contribute.

8th. As to the disbursements in Charleston, if any expenses were incurred by landing part of the cargo, in order to pump out the vessel, they may be allowed; and so any expenses attending loading, storing, &c., incurred prior to the determination to abandon the voyage.

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- 9th. Only that part of the cargo should be contributed for, which can be shown to have been damaged, exclusively, by the water. The rest of the cargo is to be assumed to have been damaged by the fire, if not proven to have been damaged by the water, and is not to be allowed for.
- 10th. The cargo is to contribute in the usual manner, including the amount allowed in general average.
- 11th. That, as to the repairs in New York, a selection of the items must be made; or, if that is impossible, an estimate of the cost of repairing that damage to the vessel, which arose from the swelling of the cargo from the water poured down. The sum which it would have cost to do this, without any other repair whatever, is to be allowed, and that only.

(Before BOSWORTH, HOFFMAN and WOODRUFF, J.J.)

Heard, January, 1856; decided, February, 1856.

THE case came up for judgment upon a verdict for the plaintiff for \$10,000, rendered before the Chief Justice and a jury, subject to the opinion of the court at General Term. There was also a stipulation of the attorneys to the following effect: "It is agreed that a verdict herein be taken for \$10,000, subject to the opinion of the court, and to be entered as a verdict for the defendant, on such opinion, for a like amount. In case the court shall adjudge the plaintiff to be entitled to a recovery on any principles, the cause shall be referred to a referee, with instructions, and subject to the order of a Judge, to ascertain the amount.

"Also, in case the court are of opinion that the plaintiffs are liable for any part of the defendant's specie, the verdict shall be for such balance, to be ascertained as aforesaid.

"Each party to be at liberty to make a bill of exceptions, presenting the questions decided by the court."

W. M. Evarts, for the plaintiff.

D. Lord, for the defendant.

The facts and the points raised by the counsel, sufficiently appear in the opinion of the court.

BY THE COURT. HOFFMAN, J.—The material facts of the case upon which the decision must rest, are these:—

The ship *Galena* sailed from New Orleans, bound for Havre, in July, 1853. The cargo was chiefly cotton, with a few thousand staves, and eight kegs of specie, six of which were shipped by the

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defendant, and two by other persons. On Saturday the 23d July, the ship was struck by lightning between one and two o'clock. It struck the mizzen topgallant-mast, passed down the mizzen-mast into the cabin, and into the between-decks. In five minutes the ship was discovered to be on fire. Holes were cut in the upper deck, around the mizzen-mast, and water poured down into the between-decks, where the cargo was. This had no effect. The holes were then stopped up to stifle the fire. This was between three and four o'clock. The fire still continued. The mate was sent to a brig, the *Anna Margareta*, in sight, and signals of distress were made. The brig was going the same course, and had been seen all the morning from daylight. The mate went on board the brig, and returned about five P. M. It seems pretty clear that the fire began about one or two o'clock P. M., civil time, of the 23d. The passengers and baggage were transferred to the brig by ten or eleven at night. The captain of the brig was requested to keep company for the night, which he did. The holes of the ship were reopened, and water poured down all night. In the morning the deck was hot; the fire appeared to gain. At daylight the captain concluded that he could not put the fire out, and must make a port of distress. An arrangement was then made with the captain of the Danish brig, by which she was to accompany the *Galena* into Charleston, and to take the specie on board his vessel. This was done because he had the passengers on board, and as a protection to the crew, in case they had to leave the ship if the fire burst out. The specie was put on board the brig because it was safer there, as in case the fire broke out it might be too late to transfer it from the ship.

Captain Beesen, of the Danish brig, was told that he would probably get his pay as salvage, either by the court or by a settlement. There was no bargain or understanding as to the amount. Both vessels bore away for Charleston. The fire did not appear to decrease. At two o'clock of the 26th they hauled into the wharf. The engines of the city then commenced playing into the ship, and she sank to the upper deck. She was filled with water. The cotton absorbed a good deal of the water as it went down. The ship lay full of water twenty-four hours. After that she was pumped out, and they commenced discharging the cargo. The water poured in before the arrival may have touched fifty to sev-

enty-five bales of the cotton; the water poured in at Charleston covered the whole of it.

The captain determined, in the exercise of his own judgment, and without advice, to abandon the voyage. He sold the cargo at Charleston, and remitted the funds. He made some slight repairs, but only what was done by his own carpenter, and brought the vessel to New York, where repairs to a large amount were made, as hereafter noticed.

While in the harbor of Charleston, and before reaching the wharf, the captain of the Galena got the specie from the Danish vessel and deposited it in bank.

The adjustment of the general average took place at New York. The statement annexed, A, is an analysis of such adjustment, the document having been furnished us. It shows that the losses contributed for amounted to \$73,964.72. Of this sum, \$5,120.37 were allowed the Danish brig; and \$5,198 to the fire-engine companies at Charleston, both fixed by the Chamber of Commerce. The expenses at Charleston, \$4,738.88, consisted of charges for discharging the cotton, piling it on the wharf, landing, storage and weighing, insurance and watching, commissions on the sales of cotton, wages and provisions. The aggregate of the sums allowed in general average of expenditures at Charleston, is \$15,057.25. At New York repairs are allowed to the amount of \$4,285.17. There is also allowed loss on cargo, by scuttling, \$42,588.07; loss on freight, \$8,880.05; on passage-money, \$703.17; adjustment fees and commission for collecting the general average, make up the total amount of \$73,964.72. The result is, that 45.09½ per cent. is to be paid by all the contributory interests, to make good these losses. The specie represented by the defendant, (\$30,858,) is made to pay \$14,364.36. The residue of the specie, owned by Rousseau, (\$9,110,) is to pay \$4,108.23.

I. The proposition chiefly argued by the counsel of the defendant is, that the specie transhipped into the Danish brig was not subject to the general average expense of the bearing away of the Galena to Charleston, nor the general average expenses, or losses, incurred there or at New York. That even admitting that the residue of the cargo, or the vessel, were liable for any other loss than the salvage paid to the Danish brig, the specie is exonerated from it. That it was separated from the vessel and residue of the

cargo; no longer in a common peril; subject only to the peril attending the Danish brig, and liable only for a due proportion of the salvage awarded to that brig.

On that basis it will be seen that even if the whole of the salvage of \$5,120, is borne by the whole of the specie, (\$39,963,) there would be only a percentage due of about 12½ per cent., or about \$3,933. This becomes, therefore, a very important point. As \$4,864.36 has been paid, there would then be a balance to be recovered by the defendant, if he is right.

The most analogous cases to the present, which I have found, are those relating to the placing of part of the goods of a ship on board of lighters or other vessels. The rules which have been applied in such cases, will, I think, afford a principle sufficient to govern this cause.

In the case of the ship *Couronne de Rochelle*, stated by Magens, (vol. 1, p. 160, case ix.) the vessel sprung a leak, which the utmost exertions of the crew could not keep under. She had sailed with convoy, and after signalling the distress, the boats of several ships came alongside to lighten her, to search for the leak, and to stop it. These boats took from the ship sixty-eight casks of indigo, and one hogshead of white sugar. These were distributed among the different vessels, and after diligent search, the leak was found and stopped. About twenty of the casks of indigo, and the hogshead of sugar, were put on board vessels which were afterwards captured by the English. The ship arrived safe at Rochelle, to which port she was bound. The residue of the indigo was delivered safe in France by the vessels to which it was transferred.

The general average was adjusted by allowing the invoice cost at St. Domingo, of the twenty casks of indigo—deducting ten per cent., a usual deduction for waste—the value of the hogshead of sugar, the freight of the indigo and sugar lost, the freight paid the other vessels for that delivered, and the expenses of adjustment.

The contributory interests were the residue of the cargo at the same valuation; the indigo and sugar, both that delivered and that captured; half of the value of the ship, appraised according to the condition she was in at the time of the average; and one half of the freight, including that of the indigo and sugar taken.

In comparing this leading case with the present, we find some points of material resemblance, and some of important difference.

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The goods which were taken on board the assisting vessels, and were saved, lost nothing of their character of goods, still following the fate of the vessel and residue of the cargo, and were as liable for any proper contribution as the goods which remained on board. So the goods which were transhipped and lost by the capture, retained their relation to the ship and other parts of the cargo, so that their loss was to be paid for in due proportions by such ship and cargo. The difference is, that the indigo and sugar were designedly transhipped, to enable the parties to get at the leak, and preserve the ship and cargo.

The foreign authorities declare that the loss of merchandise placed in boats to lighten a vessel entering a port or river, shall be shared by the vessel and her cargo. The goods are considered as if they had been thrown into the sea. Such authorities are cited by Emerigon. (Meredith's ed., p. 474.)

But the rule is subject to qualification, where the vessel requires to be lightened in order to enter her port of destination. In the latter case, no contribution can be claimed. (Pothier des Avaries, N. 140; Benecke, p. 206.) The captain and owners should have been aware of her draft, and of the water at the port. Emerigon states, also, another exception, viz., where the goods are put on board lighters, to be delivered to the owners or consignees.

The case of *Beavan v. The Bank of the United States*, (4 Wharton, 301,) has been chiefly relied upon by the counsel for the plaintiff. Notwithstanding that case, Mr. Phillips, in his last edition, (1854,) states the rule to be, that goods or any interest are not liable to contribution for any general average or expense incurred subsequently to their ceasing to be at risk. (Vol. ii, p. 155.) He cites *Dunham v. The Commercial Ins. Co.*, (15 Johnson, 315,) and proceeds to comment upon *Beavan v. The United States Bank*. He thinks that the specie, in that case, could not, upon principle, be distinguished from the case of part of a cargo delivered to a consignee, before the damage was incurred. In that case, specie, part of the cargo, was carried on the ice, and conveyed to Philadelphia by land. The vessel was ice-bound, and in imminent peril. Philadelphia was the port of destination. Considerable expenses had been incurred subsequent to the removal, from placing the cargo in lighters, reshipping it, and otherwise. For such expenses contribution was claimed of the specie.

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Dunham v. The Commercial Insurance Company settled, that when the cargo had arrived at its port of destination, and had been delivered, and freight earned, it could not be made to contribute for subsequent expenses and charges; such as the expenses for wages and provisions, while the vessel was in dock to repair the damage sustained on the voyage. Such expenses could not be considered as incurred for the benefit of freight or cargo.

Lewis v. Williams, in this court, (1 Hall's Rep. 430,) establishes the rule, that where goods are placed in lighters, upon the vessel stranding in the harbor of her destined port, and some of them sustain a damage, this shall be allowed in general average as well as the expenses of the transportation. The vessel was got off, but, in proceeding up the bay, was again stranded, and lost. The contributory interests were the freight, and the cargo at the invoice prices. The vessel was not claimed for, nor brought in as a contributory interest.

We find, in this case, the principle, that as to the goods in the lighters, there continued a common interest and common liability. There was no severance of the connection, even although they were in progress of being delivered from a part of the harbor to the port of destination.

The Case of *Whitridge v. Norris*, (6 Mass. Rep. 125,) is carefully examined by both Chief Justice Jones, and Mr. Justice Oakley, and shown to be entirely consistent with their decision.

The attempt is made to treat this as a naked case of the salvage of the specie, for which it should bear its proper share of the amount awarded to the Danish ship, and that no part of the general average expenses ought to be charged to it.

The cases of salvage in behalf of a stranger are, in strictness, when the property is abandoned, or derelict, or the vessel has been recaptured. The salvor takes possession, which he has a right to retain, although the actual property of the owner is not divested. But to the extent of his lien, the salvor's possession and right are absolute and exclusive. The mere temporary absence of the owner to obtain assistance does not destroy his exclusive right of possession. (*The Bee*, Ware's Rep. 332; *Lewis v. The Elizabeth*, id. 41.)

If we attempt to separate the delivery of the specie from every other part of the transactions between the masters of the vessels,

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we shall find it very difficult to consider it as a case of salvage proper. There was the consent of the captain of the *Galena* that the other should have the temporary custody of the specie, for the better chance of preservation, with a right to reclaim possession, and the actual exercise of that right in the harbor of Charleston, by consent. The owner of the Danish vessel was content to look for his compensation to the judgment of a tribunal, or an adjustment by consent. The case has a close resemblance to the freight which, in the case from *Magens*, was paid to the two ships which delivered portions of the cargo in safety.

But it is impossible to disconnect any one part of these arrangements and transactions from the other. The whole was one integral and indivisible transaction, growing out of one peril, and controlled by one contract.

The engagement of the Danish brig was for the common benefit. The transfer of the specie was like that of a transfer to a boat or tender alongside, for a temporary purpose.

It is undoubtedly true, that cases of remuneration are not limited to instances of derelict, abandonment, or capture. Services rendered to a vessel in peril, even in co-operation with the master and crew, form a just claim for it.

Thus, in the case of the *Elvira*, (1 Gilpin's Reports, 67,) the extra services rendered by a pilot, beyond the mere sphere of his duty, were allowed for. The services were such "as exalted a pilotage service into something of a salvage service." The master and most of the crew remained on board. The same was held in the case of the *Wave*, by Judge Betts, (1 Blatchford & Howland, 243.) See, also, the ship *Henry Embank*, (1 Sumner, 414.)

And in *Allen v. The Ship Canada*, (Bee's Rep. 90,) a ship was in distress, and the captain of another vessel, at the earnest request of the master, kept company with her, hoisting a light at night, until she was in safety. Compensation was allowed, although the evidence was, that the danger was not imminent. It was not allowed as a strict case of salvage.

These cases justly fall within the observation of Mr. Flanders, that they are not properly matters of salvage, but of a remuneration, *pro opere et labore*. (Maritime Law, p. 324.)

Nor is it at all anomalous that a case of salvage should form part of a matter of general average, and enter, with other items

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proper to such a case, into the adjustment. Thus, in the case of the Vreede, (Magens, 308, case xxv.) two anchors, which had been cut away in a storm, were recovered, and salvage paid for them. This amount went into the adjustment of a heavy case of general average.

The result appears to be, that the specie put on board the Danish brig, continued, as between its owners and the owners of the Galena and her cargo, precisely as if it had remained on board the latter vessel. It may, indeed, be urged with much force, that had it been lost by the foundering of the Danish brig, it would have been a subject of contribution. But, at any rate, it was temporarily transferred; it was saved. The possession could have been resumed at any time during the voyage to Charleston. It was resumed in the harbor. It was deposited, no doubt at the control of the captain, in bank. It would have been reshipped, had the voyage been resumed. It was, in effect, as much connected with the ship and her voyage, as the rest of the cargo, until the abandonment. We think, therefore, it must contribute for such damages or expenses, being subjects of general average, as it would have been liable for had it been kept on board.

II. We proceed to consider which of the items of general average, allowed by the adjusters, were proper subjects for it.

And first, as to the repairs. We conclude, after a careful examination of the adjustment, that a mere trifle, if any thing, was disbursed for repairs in Charleston. The holes, which were cut in the deck at sea, were, no doubt, filled up; and this expense may, perhaps, be a charge for a general average. We presume it too inconsiderable to deserve notice. But when the vessel came back to New York, very large expenditures were made upon her, and of those, the sum of \$4,738.88, is charged to general average.

The captain states the damage done to the ship by the fire, viz., the burning of the beams of the upper and lower decks, the cabins, some set of knees, some of the timbers, and the mizzenmast between decks. The ship was also greatly injured, he states, by the swelling of the cargo, caused by the water. No repairs were done to the ship at Charleston, except what were performed by his own carpenter.

The claim cannot be presented in a stronger light than if the repairs had been made in Charleston.

We have, then, this point presented: Are the repairs of a vessel, at a port of necessity, when the voyage is there broken up, and the cause of resort to that port was a peril purely fortuitous, subjects of contribution in general average?

Mr. Abbott states the summary of the English decisions thus: (Ed. Boston, 1854, p. 632,) "It seems to result, that if a vessel goes into port in consequence of an injury, which is in itself the subject of a general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses during the stay, are to be considered as general average." See, also, *Hull v. Jacobson*, (29 En. L. and Eq. Rep. 116.)

Mr. Flanders, (Maritime Law, p. 268,) considers the English rule to be, that contribution is due for repairs absolutely necessary to enable the ship to perform her voyage.

In *Paddelford v. Boardman*, (4 Mass. Rep. 348,) it was decided that wages and provisions are to be allowed during a detention in a port of necessity, arising from stress of weather, but not the repairs of the ship.

In *Williams v. Suffolk Ins. Co.*, (3 Sumner, 510,) Justice Story held, that the expenses of going into a port of necessity, to refit, could only be a general average, when the voyage has been resumed, or might have been; not, if it is abandoned from necessity.

In *Meyers v. The Harriet*, (Adm. Eastern Dist. Penn., July, 1848, cited Wheaton's Digest, vol. 2, p. 48,) it was ruled, that the expenses and costs of the repairs of a vessel, in a port of necessity, do not constitute a case of general average against the cargo, where it is found impossible to proceed on the voyage, which is then broken up.

Walden v. Leroy, (2 Caines' Rep. 262,) is expressly limited to a contribution for wages and provisions: and Chief Justice Kent distinguishes the case from that of the repairs themselves, as settled in the Digest, (14, 2, 6.)

In *Patter v. The Ocean Ins. Co.*, (3 Sumner, 28,) wages and provisions were allowed, and not repairs. It is true, the point was not raised.

Thornton v. The United Ins. Co., (3 Fairfield, 150,) is to the same effect, viz., to allow wages and provisions.

In *Brooks v. The Oriental Ins. Co.*, (7 Pickering, 259,) the repairs

necessary to enable the vessel to return home, from a port of necessity, were allowed in general average.

As to the case of *Barker v. The Phoenix Ins. Co.*, (8 John. Rep. 307,) two observations are to be made. The reporter, in the head note, states that the repairs, in Copenhagen, were included in the general average allowed. The probability is, that they were not included. The accounts produced, (p. 310,) included the expenses of the vessel, including repairs, captain's and seamen's wages, provisions, and all the other expenses in relation to the vessel and cargo; and the claim was for all these, except such as were properly chargeable to the vessel, as a particular average. Chief Justice Kent, in delivering the opinion of the court, says, that the objection is, that the defendants are charged with the cargo's proportion of a general average, arising from the unloading and storage of the cargo, and the wages and provisions of the crew, during the time the vessel was detained at Copenhagen to refit. He refers to *Walden v. Leroy*, (2 Caines, 263,) as deciding the point. (See *supra*.)

But, besides, the cargo was reloaded after the repairs were made, with the express intention of proceeding on the voyage, when, for the first time the interdiction of the government was discovered.

We may, also, usefully resort to the foreign authorities, for information and guidance upon this subject.

M. Pardessus, in his *Droit Commercial*, (vol. 3, article 789,) observes: "The right of those attempted to be charged, to examine into the character of the accident, and the primary cause of the disaster, is clear. A distinction will here be necessary. The tempest, the lightning, or other cause, has broken the masts. It is a case of simple average. But the impossibility of navigating the ship, compels a resort to a port of necessity, from the danger of perishing. That detention, (*relâche*), and the expenses attending it, are matters of common contribution; but not the disbursements for repairing the ship, or of replacing it in the same condition, (*de radoub et de la remise en état de navire*.) The deliberation which has caused the destruction has not changed the character of the previous accident."

M. Lemonnier, in his *Commentary upon Maritime Assurance*, (Paris, 1843,) discusses the general question, in regard to the wages, and provisions, and other expenses of such a detention,

when the cause is a mere peril of the sea ; and upon a critical examination of the 400th and 403d articles of the Code of Commerce, concludes, that even these ought not to be brought into a general average. He makes the following judicious observations, (vol. 2, p. 109, art. 303 :) " The expenses which are allowed, as averages in gross, are not so classed by the legislature, because they concern at once the vessel and the cargo, but because they have been voluntarily, or necessarily incurred for the common safety. A jettison is made to lighten the ship during a tempest—masts are cut away—anchors abandoned. These acts cause a loss, or involve expenses ; but it is not the maritime fortune which is the cause of them, it is more or less the occasion, but it is the will, the intelligence, and the hand of man, which determines and effects them. It is by the infallible sign of the concurrence of the human will, that we recognize a gross average."

" Every leak places, more or less, the cargo in danger. It is interested in having that leak stopped. On that ground, not merely the expenses of the detention, but the repairs themselves, ought to be found among gross averages." He closes thus : " The detention is as fortuitous as its cause. The disbursements rendered necessary by it, are, in reality, only a forced consequence of the prior average, and the same reason which forbids us to treat, as a common average, the expenses of the repairs, commands us to class, as particular average, the expenses of the detention, an indispensable preliminary of those repairs."

In support of these views, he cites the decision of the Court of Cassation, (in 1841,) admitting, however, that other decisions are to the contrary.

M. Boulay Paty, the editor of Emerigon, in his work entitled *Cours de Droit Commercial*, (Paris, 1834, vol. 4, p. 482,) discusses this subject, and concurs with Lemonnier in his conclusions. Emerigon inclines to the opinion, that repairs necessary to render the vessel navigable, made at the port of repose, are proper objects of contribution. (Meredith's ed. 482.)

The celebrated case of the vessel from Ostia, cited from the Roman law, (Emerigon, p. 481,) is exactly in point, to show that the repairs are not to be allowed. The injury which drove her to Hippone was from lightning.

I think it may be concluded, that the weight of authority is

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irresistible to prove, that reparations of a vessel, in a port of necessity, where she is driven by a fortuitous cause, are subjects of particular average, with the exception, that if they are incurred to repair a loss which is itself a subject of general average, they may be treated as common averages; but only to the amount necessary for that purpose.

We consider, however, that there is one exception to this rule in the present case. The damage to the vessel, caused by the swelling of the cargo, from the water poured down, may be allowed. What can be distinctly traced to that cause, that is, what it would have cost to repair that specific damage, should be contributed, and no more. We call attention to the item of \$2,542.50, which appears to be for coppering, and to similar items, whether they fall within this rule.

The adjustment must be examined, and if necessary, corrected, so as to limit the amount to be allowed for repairs to the sum essential to repair that injury which was caused by the swelling of the cargo.

2d. The expense of hiring the fire-engines, was incurred to put out the fire, and was for the common benefit of cargo and vessel. We consider the specie as still on board, liable for what any other part of the cargo was responsible. Such an expense was justly chargeable upon the residue of the cargo, as well as upon the vessel.

3d. The next subject of consideration is the freight. The adjusters have found, as I understand the adjustment, that the whole freight list was \$9,562.66, and have deducted for freight on one hundred and forty-seven bales burned, \$682.61, leaving to be paid for, \$8,850.05. This amount is to be made good, and the contributory amount which the freight pays, is \$4,004.87. The owner of the freight, here the owner of the vessel, will receive the balance of \$4,875.18, less what he contributes as owner of the vessel.

It may be taken, as a general rule, that a claim for freight follows the fate of a claim for the vessel. If a vessel is lost under circumstances which make her loss a case of general average, the freight, which is lost, is an additional sacrifice of the owner. It has been earned in part, and would have been earned in full, but

for the voluntary act which entailed the loss of the vessel, and, of course, prevented the earning of the freight from the shippers.

In the case of *Gray v. Waler*, (2 Serg. & Rawle, 229,) the act was deliberate, and necessary for the preservation of the cargo. The vessel was so much injured as to be condemned and sold. The cargo was accepted by a sufficiently authorized agent, at the port of disaster. Freight, *pro rata*, was due. The vessel was allowed, at the value when she sailed, deducting deterioration for her wear and tear, and the freight which had become due, *pro rata*.

In the *Columbian Ins. Co. v. Ashley*, (13 Peters,) as the vessel was wholly lost, and yet allowed for, the freight was allowed as its accessory.

But when it appears that the ship, the source of the freight, is not to be allowed for, when the voyage is broken up, and no freight can be recovered from the shippers, when nothing to which the owner is entitled, is given up for the benefit of others, a claim for contribution cannot be sustained. Contributors to general average are not insurers of the freight.

Of course, if freight cannot be allowed for, it cannot be called upon to pay.

4th. Next, the adjusters have allowed for damage to the cargo, by reason of what they call the scuttling, the sum of \$42,513.07, and make the whole cargo, at what I understand to be the invoice prices, to contribute for it, viz., \$134,000.

It is not strictly accurate to say that there was a scuttling at Charleston, although acts were done purposely to hasten the sinking of the ship. She was filled with water, by streams from the engines, in order to extinguish the fire, and some damage to the cotton resulted from this.

Mr. Benecke states the rule, applicable to this branch of the subject, thus: "If water is poured down the hatches of a vessel to extinguish a fire, in the hold or between decks, this must be considered to be done with the double purpose, of saving the articles which have already caught fire from utter destruction, and of extricating the vessel and rest of the cargo from an imminent danger. The effect of the water upon the former goods is, therefore, particular average; it is not an injury, but a real advantage to them. But the damage done, by the water, to the other goods, is, I conceive, of the nature of a general average." (Benecke, p. 165.)

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The invoice amount of the cotton is ascertained by deducting the amount of the invoices of the other portions of the cargo from the whole of the invoices. The following statement shows the result:—

Total amount of invoices,	\$134,000 02	
Specie,	\$31,853 00	
Specie,	9,110 00	
Trunk,	100 00	
Staves,	341 25	
	<u>\$41,404 25</u>	
Case of snuff,	25 00	41,429 25
The invoice amount of the cotton must then have } been		92,570 77

SALES.

Of cotton damaged by water,	\$48,739 21	
Of cotton by fire,	1,359 70	
	<u>\$50,098 91</u>	50,098 91
		<u>\$42,471 86</u>
Damage to cotton, by the adjuster's statement, as } arising from the scuttling, as he terms it, . . . }		\$42,513 07
Difference,		\$41 21

The number of bales of cotton which were injured by the water can, no doubt, be ascertained from the account-sales; and the comparison of the invoice cost, of such number of bales, with the proceeds of the sale, would give the damage.

If the loss upon the cotton, by the water, was arrived at in the manner I have suggested, it would be liable to this objection: the sales, which produced \$48,739.21, may have been of two-thirds of the whole cotton, or say about \$61,700. The actual loss would then be the difference only, about \$13,000. The fire may have diminished the value of the other third so greatly, as to make it yield but the \$1,359.70. In other words, there may have been nearly a total loss of one third of the whole amount of cotton, by

the fire, and a loss of about twenty-one per cent. on the other two-thirds.

The result which the adjuster has reached may, however, be entirely accurate. It is necessary that he should state the process by which he arrived at it. The principle is before given.

5th. There is the sum of \$4,738.88, charged in general average expenses at Charleston. A large part of the items is stated in the schedule annexed to this opinion, amounting to \$3,591.13. There are, for example, the charges: \$650, for discharging cotton and pumping out water; for landing, storing and weighing cotton, \$959.15; commissions on sales of cotton, \$1,218.48; wages, provisions, &c., \$291.43.

We do not see upon what ground the most of these charges are made subjects to be contributed for. If, indeed, expenses had been incurred in landing part of the cargo, in order better to empty the vessel of the water, they might be, perhaps, properly allowed; but we understand that the water was pumped out before any portion of the cargo was landed.

Again, if the cargo was landed, and expenses incurred with a view to the resumption of the voyage, a claim for such expenses might be valid. But, we presume, the cargo was landed, if not after a determination to break up the voyage, yet, at least, without a view to its continuance. If, however, such expenses were incurred with a view to decide, as to the resumption, they may be proper. The adjuster, or referee, may inquire into this matter, and make such allowance as shall be proper, if the facts will warrant it.

The parties can probably settle, upon these principles. If not, there must be a reference, to revise and correct the adjustment. The order will be drawn up by the attorney of the plaintiff, and submitted, for settlement, to one of the Judges.

A.

ANALYSIS OF THE ADJUSTMENT OF THE GENERAL AVERAGE.

Losses contributed for.

Danish brig,	\$5,120 37
Fire-engine company,	5,198 00

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Sundry Expenses.

Discharging cotton and pumping out water, \$	650	00
Piling cotton on wharf,	238	37
Landing, storage, weighing cotton,	959	85
Insurance on the cotton on the wharf,	101	00
Watching ship and cargo,	132	00
Commission on sales of cotton,	1,218	48
On \$48,739.21, by water only.		
On \$1,359.70, by fire only.		
Wages, provisions, &c.,	291	43
	<u>\$3,591</u>	13
Sundry other items,	1,147	75
		<u>4,738 89</u>
Total charged to general average at Charleston, . .	\$15,057	25
Proportion of expenses of repairs in New York, . .	4,285	17
Among the items are these—		
1,386 sheets Y. metal, 10,170 lbs., } at five cents, }	\$2,542	50
Refastening, caulking, coppering,	1,218	00
600 bushels of salt,	250	00
	<u>\$4,010</u>	50
One third off,	1,336	83
	<u>\$2,673</u>	67
Captain Leavitt, discount paid on remitting } \$39,000 to New York, }		195 00
		<u>\$19,587 42</u>
<i>Cargo.</i>		
Loss on cotton by scuttling,	\$42,513	07
Snuff, \$25; clothing, \$50,	75	00
		<u>42,588 07</u>
<i>Freight.</i>		
Freight list,	\$9,562	66
On 147 bales burned,	682	61
		<u>8,880 05</u>
Loss in passage-money,	703	17
Adjusting, \$450; bond, \$2; commissions collecting } general average, \$1,804.01, }		2,256 01
Amount to be contributed,	\$73,964	72

Clafin v. Butterly.

Contributory Interests.

Vessel valued at	\$28,000 00	
Less repairs particular average,	8,088 26	
		\$19,911 74
Freight made good,		8,880 05
Passage at time of sailing,		1,225 00
Cargo,		134,000 02
		<hr/> \$164,016 81
\$164,016.81: 73,964.72 about 45.09½ net.		

Ratschild, Brothers.

Defendant—

On \$31,853; specie, 45.09½,	\$14,864 66
H. Rousseau,	\$4,108 23

CLAFLIN and others v. BUTTERLY & DEVIN.

When two persons are sued together, on a contract, which on its face is their joint contract, but which at all times was, in legal effect, the contract of only one of them, a judgment may be rendered against the latter, in favor of the plaintiff, and against the plaintiff, in favor of the other defendant.

Under the Code, the plaintiff is not obliged, in an action against several, as joint-contractors, to establish the contract against all of them, in order to recover against any of them.

(Before OAKLEY, CH. J., DUER and BOSWORTH, J.J.)

February, 1856.

THIS action came before the General Term, on a verdict in favor of the plaintiffs against Devin only, subject to the opinion of the court, on questions of law. It was tried before Chief Justice Oakley and a jury, in October, 1855.

The defendants were partners, doing business under the name of "Butterly & Devin." The action was brought against them as partners, upon a written guaranty, in the firm's name, signed by Devin, to the effect that U. P. Fitzgerald should pay for all goods bought by him of the plaintiffs, from the 8th of March, 1853, when payment was due, not exceeding in amount \$300, the purchases to be on a credit of three months.

Clafin v. Butterly.

The guaranty was signed by Devin, without the knowledge, or prior or subsequent assent of his partner, Butterly.

The plaintiff having proved his case, except the execution of the guaranty with the assent of both defendants, rested.

The counsel for the defendants then moved to dismiss the complaint on the grounds—

1st. That it appeared that the said writing, so far as the defendants were connected therewith, was, if any, a joint liability.

2d. That the same was given by the defendant Devin, without the privity or consent, express or implied, of the other defendant, and in a matter not connected with the transactions of Butterly & Devin.

3d. And that the plaintiffs had not shown any connection between the said Butterly and the said writing.

The said Judge, on the said motion, ordered the complaint dismissed as to the defendant Nicholas Butterly, and refused to dismiss the same as to John Devin; to which refusal the counsel for the defendants then and there excepted.

The counsel for the defendants offered to prove that the said Nicholas Butterly, the defendant, was not dead, but living in the city of New York, and that the said Nicholas Butterly was, at the time of the making of the said writing, the partner of the said Devin, and doing business in the city of New York, and in the name, style and firm of Butterly & Devin.

And, thereupon, the said Judge rejected the evidence as irrelevant, to which opinion and decision the counsel for the defendants excepted.

The counsel for the defendants then asked the said Judge to charge the jury—

1st. That it appeared that the said writing, so far as the defendants were connected therewith, was, if any, a joint liability.

2d. That the same was given by the defendant Devin without the privity or consent, express or implied, of the other defendant, and in a matter not connected with the transactions of Butterly & Devin.

3d. And that the plaintiffs had not shown any connection between the said Butterly and the said writing.

4th. That as no personal defence is made by Butterly, if the said writing is a joint liability, so far as the defendants are con-

nected therewith, then the jury should render a verdict in favor of the defendants.

The court refused so to charge; and charged the jury that the action could not be sustained against the defendant Butterly, but that when the action is brought against two, as in this case, and it turns out that only one was connected with it, the judgment may be against that one; and that their verdict in this case should be in favor of the plaintiffs against John Devin alone, for the amount claimed by the plaintiffs.

To which opinion and charge the counsel for the defendants then and there excepted.

The said issues were then submitted to the jury on the question of damages, and they found a verdict for the plaintiffs for three hundred and thirty-six dollars and seventy-five cents, subject to the opinion of the court at General Term, on the said questions of law so reserved at the trial.

Wm. Allen Butler, for plaintiffs.

Geo. Shea, for defendant Devin.

BY THE COURT. BOSWORTH, J.—This action is brought against the defendants, as partners. The pleadings and proofs show, that Devin, without the knowledge or assent of Butterly, signed the firm's name to an instrument, guarantying to the plaintiffs, punctual payment, by Fitzgerald, for all goods they might sell him after March, 1853, the liability, under the guaranty, not to exceed \$300 at any one time.

Butterly is conceded to be not liable. The only question is this: The plaintiffs having sued the defendants, as partners, on a contract purporting to be signed by the firm, and bearing the genuine signature of the firm, can he have judgment against one only, when it is clear that the other defendant is not liable?

Under the old system, it was well settled, that in an action against several, as partners, or joint contractors, if the evidence established that too many persons were made defendants, and that the contract was not obligatory upon all, as the joint contract of all, the plaintiff could not recover against any of the defendants, although the only persons liable, were, in fact, made defendants in the action. (1 Chitty on Pleadings, 50.)

Claffin v. Butterly.

In actions upon contracts, it was also necessary that all of several joint promisees, should be made plaintiffs. If there were too many or too few parties, the plaintiffs could not recover in that action. The consequence was, that for such a defect of either parties, plaintiffs or defendants, the plaintiffs were driven to a new action, and were subjected to the costs of all the defendants, in the first action.

The 274th section of the Code, provides that the judgment may be given for, or against, one or more of several plaintiffs, and for, or against, one or more, of several defendants.

This language is broad enough to admit of a judgment being recovered against one of two persons, sued as partners, and of a judgment being rendered, in the same action, against the plaintiffs, in favor of the other defendant.

The codifiers, in the note to this section, and which was reported with it to the legislature, referred to the rules, in actions at law, above stated, and suggested that this section was designed, among other purposes, to abrogate those rules, and allow a judgment to be taken, in favor of the plaintiffs shown to be entitled to recover, and against the defendants shown to be liable. The legislature passed the section, with this avowal of the intent with which it was drawn, well known to it. It is not unreasonable to infer, that they passed it to enable that intent to be realized.

In this case, although the contract, on its face, is the contract of a firm, and although all the members of the firm are prosecuted as being the parties who made it, yet the pleadings and proofs show that, in legal effect, it is the contract of one of the members of the firm only, and a recovery is had accordingly.

In *Brumskill v. James, et al.*, (1 Ker. 294-301,) the action was on a note, made in the copartnership name of Eaglesum & Co., and was brought against James and Eliza Eaglesum, as being the persons composing the firm. James Eaglesum alone appeared and defended. It turned out that his partner was his wife. The Judge, at the circuit, was requested to charge the jury, that if they found, that at the time the notes were made, the defendants were husband and wife, they should render a verdict for the defendants. This the Judge refused to do, but charged that, "where an action is brought against two persons, and it turns out that only one was ever liable, the judgment may be against the one so liable." To

this charge, and to the refusal to charge as requested, exceptions were taken.

In speaking of these exceptions, the court say: the defendant "relies upon the misjoinder, and upon the general rule of the common law, that where a joint contract is the subject of the suit, the recovery must be against all the defendants or neither. This was the inconvenience the above provisions of the Code were designed to remedy, and no case is likely to be presented, in which their application would be more manifestly equitable and just, than the present."

All the Judges, except Selden, J., concurred in that opinion.

In this action, it is enough to sustain the decision made at the trial, and to entitle the plaintiff to a judgment on his verdict, to hold, that when two defendants are sued jointly, on a contract which, on its face, is the joint contract of both, but which, in legal effect, was, at all times, the contract of one only, a judgment may be rendered against the party liable, and in favor of the other. The defendant, in such a case, might have been sued alone, and a recovery had against him, on a complaint stating the actual facts.

This rule has been applied by the Supreme Court, at General Term, when the same court held, that under § 274 of the Code, as construed by them, a recovery could not be had against one of several defendants alone, except when such a judgment could have been had against him if he had been sued alone. (*Parker v. Jackson*, 16 Barb. 33.)

The latter rule virtually concedes, that in all cases, where several are sued as joint contractors, a recovery may be had against the parties who made the contract, although it is not the joint contract of all. For had those who made it been sued alone, a recovery could have been had against them, as a matter of course. (*Harrington, v. Bingham*, 15 Barb. 524.)

The plaintiff is entitled to judgment, on the verdict against the defendant, Devin.

ALLEN v. HASKINS.

An answer, containing a counter claim, is not demurrable, because it is not an answer to the whole of the plaintiff's cause of action.

The Code prescribes no rule, by which to determine the sufficiency of an answer containing a counter claim, except that it must state facts sufficient to constitute a good cause of action, in favor of the defendant and against the plaintiff, and that it be one of the several causes of action defined by § 150 of the Code.

(Before OAKLEY, CH. J., DUKE and BOSWORTH, J.J.)

February, 1856.

THIS action came before the court, on an appeal by the plaintiff, from an order overruling a demurrer, interposed by him, to the defendant's answer. The issues of law, raised by the demurrer, were tried before Mr. Justice HOFFMAN, in December, 1855.

The pleadings are as follows, viz. :—

The plaintiff complains against the defendant, and states, that the defendant, on or about the 31st day of January, 1855, at the city of New York, made this promissory note, bearing date the said 31st day of January, and thereby promised to pay, four months after the date thereof, to the order of himself, \$120, for value received. And the said defendant endorsed the said note in blank, and duly delivered and put the same into circulation, and the said note was afterwards, and before it became due, duly transferred and delivered to the plaintiff, for value, and the plaintiff is now the legal owner and holder of the said note; that when the said note became due and payable, it was duly presented, by a notary public, for payment, but the defendant refused to pay the same. Wherefore, the plaintiff demands a judgment against the defendant for the said sum of \$120, and interest thereon from the 2d day of June, 1855, besides notary's charges and the costs of this action.

The defendant, for amended answer to the complaint, upon information and belief, denies that the note, mentioned and referred to in said complaint, was, after it was made by him, and before it became due, duly transferred and delivered to the plaintiff for value. And he avers, that the said note was made and delivered by him to one Dillinger, who, this defendant is informed and believes, was,

Allen v. Haskins.

at that time, an agent or servant of the plaintiff, and acting as such, on behalf of the plaintiff, in that transaction, in exchange for a quantity of segars, which were sold, by sample, to the defendant, at that time, by said Dillinger, as such agent; that when said segars were delivered to this defendant, they did not correspond with the samples, and were not worth, in all, the sum of twenty dollars; that, as soon as the defendant learned the character of said segars, he offered, to said Dillinger, as such agent, to return them, which he is still ready and willing to do. Wherefore, the defendant says he has been damaged by the plaintiff, by the fraudulent sale aforesaid, in the sum of \$100, which he claims to recoup from the amount of the said note. And the defendant demands judgment against the plaintiff for the costs of this action.

The plaintiff demurs to the defendant's amended answer, in this cause, for insufficiency, and states the following grounds of demurrer:

1st. That the said answer is pleaded in bar of the whole of the plaintiff's complaint, but alleges facts in bar of only part of the cause of action set forth in that complaint.

2d. That the said answer does not deny any material allegation of the complaint, nor does it set up new matter in bar thereof.

3d. That the said answer does not state facts sufficient to constitute a defence, or deny the plaintiff's cause of action.

J. H. Harte, made and argued the following points, in behalf of the appellant.

1st. The answer professes to be an "answer to the complaint," and "demands judgment against the plaintiff." It claims to answer the whole complaint, and demands judgment for the whole of the defendant's costs, without any deduction. It does not, in terms, admit any sum to be due the plaintiff. It is pleaded, in bar of the whole demand, but alleges facts in bar of a part only of that demand, and is, therefore, demurrable for insufficiency. (10 How. Pr. R. 67, 73; 6 id. 436; Chitty on Pl. 454; 18 J. R. 28.)

2d. The denial, in the beginning of the answer, is not intended as a defence of itself, but only to lay a foundation for the new matter. It is not a general denial, and does not take the place of the old general issue, so as to allow recoupment to be given in evidence under it. It is, moreover, a denial of immaterial allega-

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tions, (9 How. 215, 216, 217,) and it is not in the form required by the Code, being "on information and belief," which the Code does not allow, and is, therefore, a mere nullity. (10 How. Pr. R. 22; Code, § 149.)

3d. The facts alleged in the answer do not constitute a "defence," nor do they amount to a "counter claim," and are, therefore, insufficient. (10 How. Pr. R. 72, 73; Code, § 149.)

4th. The Code does not authorize a partial defence, nor did the "former practice" allow a partial defence, and that practice is continued by the Code. (Code, § 468, 469; 10 How. 67, 73.)

5th. The facts alleged in the answer, not being well pleaded, are not admitted by the demurrer, (10 How. Pr. R. 10,) and they have been sworn by the plaintiff to be wholly false, as to his being in any way connected with the sale of the segars, or the origin of the note.

6th. Even if the order should be affirmed, as the point has not been settled under the Code, it should be without costs. (8 How. Pr. R. 441, 448.)

W. H. Disbrow, for respondent.

BY THE COURT. BOSWORTH, J.—This case was submitted on written points.

No point is made upon the papers submitted, that the averment that the segars "were sold by sample" was not a sufficient allegation that they were sold upon an agreement or warranty, that the bulk of the articles should correspond in quality, with the sample, with reference to which the contract was made. (*Bierne v. Dord*, 1 Seld. 95.) On the contrary, the appellant's points state that "this appeal is brought for the purpose of settling the question, whether a partial defence can be pleaded in bar." This assumes, that the facts stated in the answer constitute a partial defence, and the appellant contends that a partial defence cannot be pleaded; that to constitute a good answer, the defence it presents must be total, and that the answer in question does not contain a counter claim, because, as is insisted, the facts stated show a partial failure of consideration, and do not give a right of action.

If the sale was, what is technically termed, a sale by sample, the defendant, if the segars delivered did not correspond with the sample, would have a right of action, to recover the difference

between the value of such goods in the condition they were at the time they were delivered, and of the same goods in quality like the sample. (*Bierne v. Dord*, supra; *Hargous v. Stone*, 1 Seld. 72.)

The Code declares that the sufficiency of pleadings is not to be determined by pre-existing rules, but by those prescribed by the Code itself, (§ 140.) That an answer may contain new matter, constituting a counter claim, (id. 149.) A cause of action, arising out of the contract or transaction set forth in the complaint, is a counter claim, (id. 150, sub. 1.) The Code has no such qualification as that the counter claim, to be pleadable, must entitle the defendant to an amount of damages equal to the amount of the plaintiff's claim. It is enough, so far as the essentials of a sufficient answer are prescribed by the Code itself, that it states facts constituting a cause of action against the plaintiff, arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action.

If the defendant had paid cash on the delivery of the segars, it will not be pretended, if the sale was by sample, and the goods delivered did not correspond with the sample, that the defendant was remediless. If he offered to return the goods, on discovering the defects, he could maintain an action to recover his damages.

Assuming the allegations of the answer to be sufficient as a pleading, to raise the issue, whether the sale was one by sample, then it is quite clear that it sets up a counter claim, as that word is defined by the Code. The Code does not discriminate between the counter claims, which it defines, and allow those to be set up which give a right to damages equal to the amount of the plaintiff's demand, and prohibit setting up those on which the damages claimed do not equal it.

The Code prescribes no rule by which to determine the sufficiency of an answer containing a counter claim, except that it must state facts enough to constitute a good cause of action in favor of the defendant and against the plaintiff, and that it be one of the several causes of action defined by § 150 of the Code.

This answer sets up such a counter claim. It follows that the demurrer was properly overruled, and that the order appealed from must be affirmed with costs. But the order of affirmance will allow the plaintiff to reply, on payment of costs of the de-

FREDERICK M. KELLEY and others v. FRANCIS H. UPTON.

The intention of the parties, in a contract of sale, must be collected from the whole instrument; and, in order to carry that intention into effect, the literal import of the words used may be disregarded.

The true character of the contract, as executed or executory, depends upon the proper answer to the question, whether it was intended to vest in the purchaser a present and absolute title to the thing sold.

Where the delivery of the thing sold, and the payment of the price, are to be simultaneous acts, the title, until delivery or payment, remains in the seller.

Where the acts are to be thus concurrent, the promises of the parties are dependent upon a mutual performance, and neither can maintain an action against the other, without showing, on his own part, an actual performance, or a legal offer to perform.

Hence, when the contract relates to a future transfer of stock, the seller, to maintain an action for the price, must prove a tender of the stock, before the action was commenced.

The mere admission, by the purchaser, of his liability, when payment is demanded, does not operate as a waiver of such tender.

New trial ordered.

(Before OAKLEY, CH. J., and DUKES, J.)

February, 1856.

THIS was an action to recover damages, for the breach, by the defendant, of his agreement to purchase from the plaintiffs 3,000 shares of the stock of the Lindsay Mining Company.

The defence was, that the stock had not been tendered to the defendant before the commencement of the action. The answer also claimed to set-off \$875, the amount of a promissory note, which the defendant had placed in the hands of the plaintiffs, as a security for his performance of the agreement, and which it averred they had collected.

The cause was tried before the Chief Justice and a jury, in November, 1855.

The following are the proceedings on the trial:—

The plaintiff called, as a witness, James S. De Mott, who, being sworn, testified: I am in the employment of the plaintiffs, Kelley, Townsend & Company, and was so in April, 1854, and have ever since been in their employment; I know the defendant Upton.

Kelley v. Upton.

Two paper-writings were shown the witness, and he then said: I called upon the defendant, at his office, in the city of New York, at the request of the plaintiffs, on the 19th day of September, 1854, with these papers; I presented them to the defendant, saying, "Kelley, Townsend & Company want the money on these;" he took the papers and looked them over, and said, "These are all right, I wish to God I could pay it, but I have not got the money to pay it; parties owing me beg me to let them off a short time, and I can't pay it now." I then left, and nothing more was said.

The plaintiffs then read in evidence the two paper-writings, the first of which was in the words and figures following:

3,000 shares B. 90. 72½ cts. NEW YORK, Apl. 15, 1854.

I have purchased of Kelley, Townsend & Co., three thousand (3,000) shares of the stock of the Lindsay Mining Company, at seventy-two and one half cents per share, payable and deliverable, buyer's option, in ninety days, with interest at the rate of six per cent. per annum, and six-and-one-quarter cents per share commission, and have deposited with them one hundred shares of McCulloch Gold Company stock, as security for the performance of this contract.

FRANCIS H. UPTON.

(Endorsed)

Certified for one hundred shares McCulloch Gold Co. stock surrendered, and John L. Colby's note, dated March 11th, for \$875, 7 mo. from date, substituted in place, as collateral security for the performance of this contract.

New York, May 20th, 1854.

FRANCIS H. UPTON.

The second was in the words and figures following:

F. H. Upton, Aug. 29th: 3,000 Lindsay Mining Co., a 72½.

Interest and com.,	.	.	.	.	.	\$2,395 13
Int. to Sept. 15th,	.	.	.	.	.	7 92
						<hr/> \$2,403 05

Sept. 15, 1854.

D. Sept. 19, '54.

D.—V.

The plaintiffs then tendered, in court, to the defendant, a certificate of stock, and an assignment thereof, from the said plaintiffs, duly endorsed thereon. The certificate was of 3,000 shares of the stock of the Lindsay Mining Company of North Carolina, and bore date the 4th October, 1854.

The plaintiffs then rested their case.

The defendant's counsel then moved to dismiss the complaint, on the grounds—

1st. That the plaintiffs had not proved any tender of the stock before suit was brought.

2d. That there was no evidence that the plaintiffs were the owners of the stock at the time of the sale thereof.

The court denied the motion, and the counsel excepted.

The court thereupon directed a verdict for the plaintiffs, for the sum of \$1,665.31, being the amount claimed, less the payment or set-off in the proofs and answer set forth and referred to, subject to the opinion of the General Term, upon a case to be made.

The cause was now heard upon the case so made.

J. T. Williams, for plaintiff, in moving for judgment upon the verdict, insisted that, from the terms of the contract, a tender of the stock was not necessary, before the bringing of the action. I contend, (he said,) that it was an executed contract, and a title to the stock passed immediately to the defendant, the plaintiffs retaining it merely as a security. The language of the contract, "I have purchased," showed this. Had a future sale been intended, the language would have been, "I have agreed to purchase." The case of *Lester v. Jewett*, which will be relied on by the other side, (1 Kernan, 453,) was an agreement to purchase, and so were all the cases there cited. The doctrine of that case is confined to executory contracts. The fact that there was not an immediate delivery of the stock is of no importance. The precedents and the authorities show that such a delivery is not essential to a sale. (2 Chitty's Plead. 56; 1 Cowen's Treat., 3 ed., 116, 117; Starkie on Evid., 873; 1 Parsons on Cont., 438, 441.) Again, the evidence of De Motte shows, that even if a tender were necessary, it had been duly made, or was waived by the defendant. As he declared his inability to pay, a tender would have been a mockery. (10 East. 159; 5 B. & Ald. 712.) It was not necessary for the

plaintiffs to prove that they owned the stock when the contract was made. Their not owning it, if the statute reaches the case, was a matter of defence, but no such defence was set up in the answer, or was offered to be proved upon the trial. The words of the contract, "I have purchased," are an admission that the plaintiffs then owned the stock.

E. W. Stoughton, for the defendant.

In every case of a mutual agreement, where the thing to be done by the one party, is the consideration of that which is to be done by the other, and both are to be done at the same time, the promises are dependent, and neither can recover against the other, without showing a performance on his own part, or a tender to perform. (*Thorp v. Thorp*, 1 Salk. 112; *Pordage v. Cole*, 1 Saund. 320; *Bank of Columbia v. Wayne*, 1 Pet. 255; *Parker v. Parmlee*, 20 John, 130; *Lester v. Jewett*, 1 Ker. 354, and other cases.) Here, the precise character of the agreement of the parties is that which has been stated. The plaintiffs agreed to sell, and the defendant agreed to buy, a certain quantity of stock, which was to be delivered by the plaintiffs, and paid for by the defendant, on a future day. The words of the contract are, "payable and deliverable (buyer's option,) in ninety days," clearly showing that the acts were to be concurrent. The proof clearly shows that no tender of the stock was ever made before the suit was commenced, and the plaintiff was certainly not bound to accept the tender made upon the trial. As to the evidence that has been relied on, as excusing a tender, or proving that it was waived by the defendant, it was not admissible, under the pleadings, (*Garvey v. Fowler*, 4 Sand. S. C. Rep. p. 665,) and if admissible, was plainly insufficient. There is still another ground upon which we insist that the plaintiffs are not entitled to recover. We submit that it was incumbent upon them to prove, to show the validity of the contract, that, when it was made, they were the owners of the shares of stock which they agreed to sell. Here, the certificate produced upon the trial, proved, in effect, that they were not the owners until October, 1854, nearly a month after this action was brought.

We ask, that the verdict be set aside, and the complaint be dismissed, or a new trial ordered.

Kelley v. Upton.

BY THE COURT. OAKLEY, CH. J.—Notwithstanding the words “I have purchased,” literally construed, may bear the interpretation that has been given to them, we are clearly of opinion, that the contract upon which this action was founded, was not executed, but executory; not an actual and present sale, but an agreement to sell, to be carried into effect on a future day. The intention of the parties, in agreements of this nature, is to be collected from the whole instrument; it is the intention, thus collected, that the court is bound to carry into effect, and in doing so, the literal import of particular words, when inconsistent with the intention, thus ascertained, may be, and, in numerous cases, has been disregarded. (3 Duer, 309.) In *Decker v. Furniss*, (3 Duer, 292,) the instrument, which related to the sale of a steamboat, began with the words, “W. H. Brown sells to M. P. Furniss the one-half of the steamboat Rhode Island,” yet, in reversing the judgment of this court, the Court of Appeals held that the contract had not the effect of vesting an immediate title in Furniss, but was an agreement to sell, and not a sale, and that, although the words used denoted a present transfer, a future only was intended. In determining the true character of a contract of sale, as executed or executory, the question must always be, whether the intention was to vest in the purchaser an immediate and absolute title to the thing sold, without reference to the payment of the price, or whether the delivery of the thing, and the payment of the price, were to be simultaneous acts, for in this last case, it is certain that, until delivery, the title remains in the seller. (9 M. & N. 312; 2 B. & Ald. 329; 18 John, 434; 6 Wend. 77; 1 Denio, 591.) And we deem it to be equally certain, that where delivery and payment are to be concurrent acts, the promises of the parties are dependent and conditional, and neither, therefore, is entitled to bring an action against the other, for his refusal to perform, without showing, on his own part, an actual performance, or a legal offer to perform. (*Lester v. Jewett*, 1 Kern. 454.)

Applying these rules to the contract before us, it seems to us quite evident, that it was not the intention of the plaintiffs to give to the defendant a present and absolute title to the stock, so as to enable him, at once, to claim its delivery, without paying, or offering to pay, any portion of the stipulated price; yet such was the necessary consequence, if the defendant became the owner of the

stock by the mere execution of the agreement. As to the allegation, that the plaintiffs were to retain the possession of the stock, as their security for the payment of the price, we regard and reject it, as simply gratuitous, since the agreement contains not a solitary phrase from which an intention to pledge the stock, as belonging to the defendant, can be inferred. But if the plaintiffs, without payment, were not bound to deliver the stock, it seems to us, there is no room for the supposition, that the defendant was bound to make the payment, whether the stock was delivered or not; that his promise was independent and absolute, while that of the plaintiffs was conditional. If the payment of the price, by the defendant, was a condition of the obligation of the plaintiffs to deliver the stock, we are clear in the opinion, that the delivery of the stock by the plaintiffs, was equally a condition of the obligation of the defendant to pay the price. The doubtful words, "I have purchased," upon which the entire stress of the argument for the plaintiffs was laid, are, in our judgment, controlled and explained by the subsequent words, "payable and deliverable, buyer's option, in ninety days," for these last admit but one interpretation, and conclusively show, that the payment and delivery were to be made at the same time, and, consequently, that the promises on both sides, were dependent and conditional. The agreement, therefore, was for a future transfer of the stock, and was not an executed sale.

It follows, that the plaintiffs can have no right to maintain this action, unless they have shown that they made a tender of the stock, to the defendant, before it was commenced, and not merely demanded payment of the price; or unless they have shown, and under the pleadings, had a right to show, that a tender was excused or waived. We do not think that any part of this necessary proof has been given.

It is not alleged, that there is any positive and direct proof of a tender, nor can we draw, as we were urged to do, from the language of the defendant, when payment was demanded, an admission that a tender had been previously and duly made. The inference that such was his meaning would be unwarranted, and such as a jury could never be permitted to draw.

Next, as to the evidence, that a tender was waived.

We agree with the counsel for the defendant, that, according to

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the decision in *Garvey v. Fowler*—which, although the decision of a single Judge, was approved by his brethren, and has since been uniformly followed—evidence to prove a waiver, under the complaint, as framed, was not admissible. The principle of that decision is, that where facts, excusing the performance of a condition precedent, are meant to be relied on, as a ground of recovery, they must be stated in the complaint, since such facts, as material and issuable, constitute, in part, the cause of action. And it cannot be denied, that this principle is plainly applicable to the case before us. Still, had facts amounting, in reality, to a waiver, been proved upon the trial, we will not say that the complaint might not be amended, upon terms, so as to let in the proof, hereafter; but the total insufficiency of the proof that was given, relieves us from the necessity of considering that question. Nothing more was proved than an admission, by the defendant, of his liability to satisfy the claim of the plaintiffs; but we were referred to no authorities, to show, nor can we believe, that such an admission operates as a waiver of the performance of a condition precedent.

Upon the other questions that were argued by the counsel, we do not think it necessary to express an opinion.

The verdict for the plaintiffs must be set aside, and there must be a new trial, with costs to abide the event.

ELISHA RUCKMAN v. THE MERCHANTS' LOUISVILLE INSURANCE COMPANY. Same v. same. Same v. same.

When a vessel, disabled by the perils of the sea, is in a port of necessity, and it is ascertained that the costs of repairing, making the usual deduction, will exceed a moiety of her value, there is a constructive total loss, and the owner, if insured, by abandoning in due season, may demand its payment.

The right to abandon, is, in this case, unqualified and absolute.

But the right to abandon a vessel, thus disabled, is not confined to this case; for, although the estimated cost of her repairs may be less than half her value, yet if, by the exercise of that diligence, which the master and other agents of the owner are bound to use, she cannot be placed in a condition to perform her voyage, there is a constructive total loss, and a consequent right to abandon and claim its payment.

Whether the impossibility, of putting the vessel in a condition to resume her voyage, arise from the want of necessary materials, or workmen, or of the necessary funds,

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is immaterial; where the impossibility is proved, the right to abandon equally attaches.

The doctrine, that the want of the necessary funds, or credit, must be attributed to the negligence of the owner, and is, therefore, not a valid cause of abandonment, is confined to the cases in which the vessel is in a port of destination.

The owner is not bound to provide the master with funds, or credits sufficient to meet the cost of repairs, when less than a moiety, in whatever port the vessel, by the perils of the voyage, may be driven.

But the right to abandon, when founded on the inability of the master to procure the necessary means for repairing the vessel, is not, as when founded on the ascertained cost of repairs, unqualified and absolute. It depends upon the special circumstances of each case in which the question arises.

When the master has not the necessary funds, and cannot raise them upon the credit of his owner or his own, it is his duty to raise them upon the security of the property in his charge—vessel, freight, or cargo.

Nor are the diligence and efforts of the master, to procure the necessary means for repairing the vessel, to be confined to the port of necessity in which the vessel happens to be.

When it appears that without any prejudicial delay, or an increase of expenses beyond a moiety, the want of materials or workmen could have been supplied from a neighboring port, or the necessary funds have been obtained by a communication with his owner or consignee, the breaking up of the voyage by the master will be deemed an unjustifiable act and a bar to the recovery of a total loss.

The mere retardation of the voyage, for the purpose of making or procuring the means of making necessary repairs, is not a valid ground of abandonment; nor that, from the sale or damaged condition of the cargo, the voyage had ceased to be worth pursuing.

Nor does the sale of the vessel, unless it is an act of barratry, or is justified by a necessity arising from the perils insured against, create a total loss.

The true test of the right to abandon, in all cases where the vessel has been rendered innavigable by the perils insured against, except when the ascertained cost of repairs exceeds a moiety, is to be found in a proper answer to the question, whether a prudent owner, if on the spot and uninsured, in the exercise of a sound judgment, would have broken up the voyage or have elected to repair? and it is upon this question that in all such cases the cause should be submitted to the jury.

Where the cargo is sold to defray the costs of repairs, it is not a loss from the perils insured against, for which the insurers are liable.

A total loss of freight, resulting from such a sale, is not recoverable.

New trial ordered on vessel and cargo policies. Complaint on freight dismissed with costs.

(Before OAKLEY, CH. J., and DUEK, J.)

February, 1856.

THESE actions were brought for the recovery of a total loss under three separate policies, made by the defendants on account of the plaintiff, upon the schooner Margaret Hopping, her cargo, and freight, on a voyage from New York to San Francisco.

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There were similar actions, also, upon separate policies, against the Union Mutual Ins. Co., and against the Astor Mutual Ins. Co. By consent, these were to abide the decision of the above.

The vessel was valued in all the policies at \$12,000, the cargo at \$6,000, and the freight at \$5,000.

The causes against the defendants were tried together, by consent, before Slosson, J., in March, 1854, and verdicts for the plaintiff taken in each for the total loss claimed, subject to the opinion of the court at General Term upon the questions of law arising upon the evidence, and also subject to adjustment by the court.

The following are the material facts established by the evidence:—

The schooner sailed from New York for San Francisco on the 21st of December, 1849, under the command of Captain Smith, with a sufficient crew, in good order, and well supplied for the voyage, and the plaintiff furnished the captain with funds to the amount of \$250 in specie. Her cargo consisted of 17 frame houses, 32 tons of coal, 300 window sashes, provisions, groceries, dried apples, shingles, 16 tons lumber, a quantity of joists, plank, boards, laths, &c.—a part of which latter was carried on deck—and of other articles specified in the bills of lading. It principally belonged to the plaintiff, his interest therein being of the value of \$10,000.

After leaving New York, the vessel encountered tempestuous weather, lost her jib-boom, fore-boom, some of her sails, and part of the deck load; and, in consequence, they bore up for Rio de Janeiro, and arrived there on the 15th February, 1850. Whilst there, a charge of mutinous conduct on the voyage was made by the master against the mate and some of the crew, and the mate, two seamen, and the cook, were discharged from the vessel, and having reshipped other men in their places, and repaired damages, she sailed from Rio on the third day of March. She met with bad weather and very heavy seas, and was strained, and while laboring started the main chain plate bolts, received other damage, and made considerable water.

The yellow fever broke out with great virulence. The master, mate, two of the crew, and a passenger, were attacked, and only three men were left to work the ship. It was determined to run

into St. Catharine's, that being the nearest port. The captain, one of the crew, and the passenger died.

At St. Catharine's, upon the application of Disney, the mate, a survey was held on the vessel, and the deck load was condemned. They commenced discharging from the hold on the 21st of March, and a portion of the cargo, being damaged, was sold. The proceeds of the sales of the cargo were applied to the expenses of the vessel. She was caulked and repaired after the cargo was discharged, and the hold was whitewashed.

On the 27th April, 1850, Maxwell, Wright & Co., of Rio de Janeiro, who had acted as the agents of the schooner when in that port, having heard of these disasters, employed an American shipmaster, named William H. Dean, who was then in that port, to proceed to St. Catharine's, and take charge of the schooner, as master, at the monthly wages of \$126, and to proceed in her to San Francisco. The next day Captain Dean left Rio by a steamer, arrived at St. Catharine's on the 2d of May, and took command of the schooner. The cargo, except the deck load, that had been condemned and sold, and that which was wrecked on board of the lighter, had been reloaded, and the hatches were down and caulked, at the time Captain Dean arrived. Some straggling parts of the frames of the houses, could not be got into the hold, in consequence of the stowage by the persons employed at St. Catharine's being less compact than that in New York, and those parts of the cargo were, therefore, necessarily stowed on deck.

The expenses at St. Catharine's for pilotage, lighterage, provisions, &c., paid by Captain Dean, were over \$2,500, and this amount he was enabled to pay by a letter of credit from Maxwell, Wright, & Co. In order to secure them, he executed a bottomry on the vessel for \$3,479.26, including marine interest.

The vessel left St. Catharine's on the 28th of May, 1850, and went to Santa Cruz, to take in water; and on the 7th June she sailed thence for San Francisco, with a crew of nine persons in all, with ample sails, rigging, &c.

The schooner encountered a continued series of storms and violent gales, was off Cape Horn nearly sixty days, struggling against very heavy weather; her sails were split, and some of them blown away; the running rigging was chafed very badly, and was almost unfit for use; the main-boom was broken, and the

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vessel was otherwise damaged. The crew were put on short allowance of water, and finally, on the sixty-second day after leaving St. Catharine's, they were compelled to bear away for Valparaiso, by reason of loss of sails, of the boom, and the damage to the running rigging, &c. They continued their efforts to reach Valparaiso, enduring a succession of gales, and at last, on the 30th of September, and one hundred and fifteen days after sailing from Santa Cruz, they anchored in that port.

Upon arrival, the captain noted a protest before the consul of the U. S., which was subsequently extended, and applied for a survey on the vessel. The consul, on the 1st October, appointed the captain of the port, and two American shipmasters, to hold the survey, and they found the sails badly split, and some of them unfit to be repaired; all the running rigging much worn, and in bad condition, and the main-boom sprung. They recommended the split and destroyed sails to be replaced with new, and the others to be repaired, the main and fore-lanyard sheets and down-hauls to be replaced with new rope, and the main-boom to be replaced with a new one.

The schooner stood in need of a new foresail, new mainsail, new squaresail, all her old sails repaired, a new jib, a whole new set of running rigging, fore and aft, new lanyards, new main-boom, bulwarks to be repaired, and to be revictualled for the voyage; and without such repairs she was not in a seaworthy condition to proceed.

The captain procured estimates of the cost of the repairs, and he ordered and received some new sails, a new main-boom, and the old sails and bulwarks were repaired. He and his consignees, Messrs. Lopez & Sartori, endeavored to raise the necessary funds, and to that end, on the 3d October, he advertised, in two daily newspapers, for a loan of \$2,000 to \$2,500 in bottomry. Having, as he supposed, no reason to doubt that the requisite means could be procured, he ordered the new sails. No offers of any kind were received in answer to his advertisement, and becoming apprehensive, at the end of three or four days, that he might not be able to raise funds, he abstained from ordering new running rigging, or from victualling the vessel.

The captain then made personal application to Messrs. Alsop & Co., and to another firm, for funds, offering to give his individual

security, in addition to a bottomry, but they declined to make any loan.

Finding it impossible, as he believed, to obtain the requisite means in any other way, on the 16th October he began to discharge the cargo, and gave public notice, by advertisements in the daily papers, of a sale of it at public auction, on a day and hour specified.

The cargo was badly damaged. The frame buildings, when shipped in New York, were in bundles, each piece being marked and numbered, and each bundle hooped with iron. When the hatches were taken off, and the cargo landed at Valparaiso, it was found that the bundles had been cut adrift, the iron hoops being cut, many of the same parts were mixed up together in the same bundle; others of the parts had been lost in St. Catherine's, and the houses were incomplete, so that, at the sale, the master could not warrant one of them. The other portions of the cargo were in a bad state, and did not correspond with the bills of lading in quantity. The cargo was not in a merchantable condition.

The whole was sold, and produced the gross sum of \$1,907.25, leaving, after deducting charges, \$750.06½.

This amount was insufficient to pay for the necessary repairs, supplies, and expenses, and to enable the vessel to quit the port; and the captain then endeavored, but without success, to obtain a freight for her, and an advance on the freight money. The parties having demands against the vessel became clamorous for payment, and threatened to proceed against her. Thus pressed by the creditors, the master proposed to his consignees, that they should pay the bills against the schooner, and that she should remain at Valparaiso until he had time to write to his owners, and obtain their instructions. They declined. Thus, it being impossible for the captain, as he believed, to make the repairs, and obtain the supplies necessary to render the vessel seaworthy, he again consulted with his consignees, and with the consul of the United States, and with Alsop & Co., and finally, having, as he thought, no alternative, and having an advantageous offer, he sold the vessel, by private sale, on the 15th November, to Messrs. Myers, Bland, & Co., for \$9,000, leaving net \$8,370, after paying the expenses of the sale. He also sold the chronometer and barometer for \$200.

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The charges of the consul, including \$611.89, paid to the crew, amounted to \$1,322.29. The port charges, expenses of repairs, &c., in Valparaiso, amounted to \$3,196.02½, which was paid by the master out of the proceeds of the vessel and cargo. He also deposited with Alsop & Co., \$3,479.26, to cover the bottomry bond.

The balance of the proceeds of sales, viz., \$2,449.04½, was paid by Lopez & Sartori to the master.

He retained from this amount his demands against the vessel and cargo, and remitted the balance to the plaintiff in drafts, amounting to \$1,354.50.

New running rigging would have cost about \$500, and the re-victualling and port charges outward would have cost about \$1,000.

The cost of full repairs, port dues, &c., would have been from \$2,500 to \$3,000.

Captain Dean could not have shipped the cargo to San Francisco by any other vessel without giving security for the payment of the freight, and that he was not able to do.

The cargo, in its damaged condition, was not worth the expense of transshipping it to San Francisco.

There was, besides, no small vessel at Valparaiso that could be chartered, and the cargo was not sufficient to have justified the expense of chartering a large vessel.

The bottomry bond to Maxwell, Wright & Co. was paid in New York by the plaintiff, to Grinnell, Minturn & Co., the agents of the former, and it was cancelled. On the 20th of January, 1851, the plaintiff drew an order in favor of Messrs. Jones & Johnson, upon Alsop & Co., for \$3,479.20, being the amount that Captain Dean had deposited with them, to secure the payment of the bottomry.

The plaintiff subsequently compromised the bottomry bond, for the sum of \$2,319.51, and received from Maxwell, Wright & Co. the sum the master had deposited with them. It was proved that a steamer left Valparaiso at the close of every month for Panama, and took a mail for New York, and that the master wrote, by her, to the plaintiff, which letter, if it arrived in the usual time, must have been received by the plaintiff early in December, 1852.

In January, 1851, if not before, intelligence was received by the plaintiff, by a letter from the captain, of the disasters to the schooner, and the sale of the vessel and cargo.

On the 8th of January, 1851, a notice of abandonment was delivered to the defendants, and preliminary proofs of loss and of interest were presented at the same time.

The defendants offered to pay a partial loss.

D. Lord and F. B. Cutting, for the plaintiff, made and argued the following points upon the vessel policy:

I. The defendants undertook that the schooner *Margaret Hop-*ping should not be prevented, by any of the risks mentioned in the policy, from reaching San Francisco in good safety. By stress of weather, after leaving New York, she was damaged in sails, spars and rigging to an extent that rendered her unseaworthy, and incapable of prosecuting the voyage without repairs, and she was therefore compelled to abandon it, and to seek a port of necessity in order to refit and to obtain necessary supplies.

II. Having reached Valparaiso and commenced the necessary repairs, the master was unable to raise funds upon the credit of his owner or of himself, or by bottomry of the vessel, or by any other means. The net proceeds of the cargo were wholly insufficient to pay the expenses of refitting, and he found that it was impracticable to restore the vessel to a seaworthy condition, or to leave Valparaiso, and he consequently had no alternative but to abandon the voyage and sell the vessel, rather than allow her to be proceeded against and sold by the creditors. This constitutes a total loss of the vessel. (2 Phil. on Ins. 254, § 354; id. § 1,519; id. 260, §§ 1,526, 1,528; *American Ins. Co. v. Ogden*, 15 Wend. 532; S. C. 20 Wend. 301.)

III. The sale of the vessel was justified by necessity, was made in good faith, and transferred a valid title to the purchaser.

IV. The assured was not bound to have had funds or credit at Valparaiso. The absence of funds at a port of necessity is not evidence of neglect, or of want of ordinary care and foresight. He had provided a good vessel, and had equipped her with ample sails, spars, &c., and with sufficient stores and supplies for a voyage from New York to San Francisco, together with \$250 in specie. It was not intended or expected that she should go to Valpa-

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raiso, or into any port on the Pacific other than San Francisco. To require a ship-owner to meet the extraordinary expenditures of his vessel, not only at the port of destination, but at every port into which the vessel may be driven by stress of weather or other necessity, would be in the highest degree oppressive and impracticable, and opposed to the common usages of trade.

V. Notice of abandonment, with full proof of loss and interest, was delivered to the underwriters without delay, after receiving the intelligence of the damage sustained by the schooner, and of the sale thereof by the master. (2 Phil. Ins. 368-9, 374.)

No abandonment was in fact necessary. The assured is chargeable with, and gives credit for the proceeds of the sale received by him. (2 Phil. Ins. 238, § 1,497; *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick R. 249; *Patapsco Ins. Co. v. Southgate*, 5 Peters' R. 604; *Charleston Ins. Co. v. Corner*, 2 Gill R. 410; *Mutual Safety Co. v. Cohen*, 3 id. 45.)

VI. The receipt, by the assured, of the drafts endorsed to him by Captain Dean, amounting together to \$1,354.50, was not, nor was his order in favor of Jones & Johnson, upon Alsop & Co., for \$3,479.20, any waiver of the abandonment. It was his duty to collect and save as much as possible from the proceeds, and to apply them to the claim against the defendants. (2 Phil. Ins. 394; *Brown v. Smith*, 1 Dow. 349; *Mitchell v. Edes*, 1 Term R. 608; *Roux v. Salvador*, 3 Bing. N. C. 266; *Pacific Ins. Co. v. Catlett*, 4 Wend. 75.)

VII. The plaintiff is entitled to judgment for the amount of the verdict, with interest. The bottomry bond, executed by the master in St. Catharine's, in favor of Maxwell, Wright & Co., did not affect or impair the previous contract made by the plaintiff with the defendants, nor diminish his insurable interest in the vessel, nor give to the defendants the right to deduct the amount of the bond from his claim.

The cases which treat bottomry bonds executed before the date of the policy, as in the nature of a prior assurance, do not apply.

They also made and argued the following points, upon the freight and cargo policies:

There was a total loss of freight.

1. The Margaret Hopping was damaged by the perils of the seas, to an extent which rendered her incapable of carrying her

cargo to its destination; unless by making repairs and procuring supplies. For that purpose she put into Valparaiso, but the efforts of the master, and of his consignees, to raise the funds requisite to make the vessel seaworthy, were fruitless. He was unable to continue the voyage, and, being pressed for payment by the creditors, who threatened to proceed against the vessel, he had no alternative but to sell her. She was accordingly sold, and the voyage was abandoned, no freight being earned.

2. The master was not able to earn any part of the freight, by transshipping the cargo, and carrying it to San Francisco in another vessel. (a.) He could not have chartered another vessel, without giving security for the payment of the freight, and that he was unable to do. (b.) There was no vessel of suitable size in Valparaiso to charter; and there was not sufficient cargo to justify the hiring of a large one. (c.) The cargo was badly damaged, much of it had been lost at St. Catharine's; the frames of the houses were imperfect, by reason of the loss of many of the parts; and in other respects it was in an unmerchantable condition, and not worth the expense of transshipment. There was no alternative but to sell it, and terminate the adventure.

3. The plaintiff is entitled to a judgment for a total loss of the freight, viz., \$1,000, being the sum insured, with interest from the 9th of February, 1851.

The plaintiff is entitled to recover for a total loss of the cargo.

I. The schooner Margaret Hopping was rendered incapable of performing the voyage to San Francisco, by reason of the injuries sustained by stress of weather; and the master, being unable to raise funds, could not repair or refit the vessel, so as to continue the voyage, and transport the cargo in her to its destination.

II. There was no other conveyance that could have been procured to transport the cargo to San Francisco. No vessel could have been hired, without giving security to pay the freight, and that the master could not do. There was no small vessel at Valparaiso to be chartered, and there was not sufficient cargo to justify the expense of chartering a large one.

III. The cargo was greatly damaged by sea-water, and was much wetted and stained. The frame houses were scattered, many of the parts were missing, much of it had been lost at St. Catharine's, it was in an unmerchantable condition, and damaged more

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than half of its value. It was not worth the expense of transshipment to San Francisco.

IV. A sale of the cargo was necessary. There was no alternative. (*Beadwell v. Union Ins. Co.*, 6 Cow. 270, 2 Phil. Ins. 319; *Hudson v. Harrison*, 3 Bro. & B. 97.)

V. Notice of abandonment, accompanied by preliminary proofs of loss and of interest, was delivered to the underwriters without delay, upon receiving intelligence of the disasters to the vessel and cargo, and the sale of both.

The cargo having been sold, and the proceeds constituting a credit on the claim against the defendant, there was no need of any abandonment.

VI. The receipt, by the assured, of the drafts enclosed to him by Captain Dean, if they included any part of the proceeds of the sale of the cargo, was not a waiver of the abandonment.

VII. The plaintiff is entitled to judgment for the sum insured by the defendants, &c., after allowing all just credits, according to the adjustment made by Henry W. Johnson, viz., \$950.69, with interest from the 9th January, 1851.

W. C. Noyes, for the defendants, made and argued the following points:—

I. The vessel had not sustained injury to more than half her value when she reached Valparaiso; the plaintiff cannot, therefore, recover for a total loss.

II. The vessel was not lost to the plaintiff in consequence of any peril, covered by the policy, directly and immediately causing the loss; and without this, as a general rule, no recovery can be had for a total loss.

III. The private sale of the vessel, by the master, did not create a total loss; it was without any pressing necessity to justify it; it was occasioned by the neglect of the plaintiff to provide adequate funds or credit for the voyage, by the haste and indiscretion of the master in selling so soon, and by the gross neglect of the plaintiff to furnish funds, after he knew of her condition, and his not informing the defendants, so that they could have relieved her, if he had threatened an abandonment. They could, and would have supplied her with funds to prosecute the voyage, if they had been frankly informed that any emergency existed requiring it.

1. There was not that urgent necessity for a sale, which left the master no time to consult his principal; and neither the cargo nor the ship were perishable. (*Center v. Am. Ins. Co.* 4 Wend. 45, 52; *Brig Sarah Ann*, 2 Hare's Am. L. C. 565, and note, 570; *Donett v. Young*, 1 Car. and M. 465; *Young v. Turing*, 2 Scott's N. R. 752; *Am. Ins. Co. v. Ogden*, 20 Wend. 287; 1 Arnould on Ins. 189 to 195; 2 id. 1081, 2, 3; 2 Phil. on Ins. 3d ed. §§ 15, 65, p. 303, §§ 1569, 70, 1, 2, 3, pp. 305, 6; *The Eliza Cornish*, 17 Jurist, 738.) The vessel was safely in a foreign port, and the owner was actually communicated with, but concealed all he knew about her condition.

2. It was caused by the omission of the plaintiff to provide funds and credit, which should have been provided; and although she was not in a port of destination, it was the duty of the owner to have provided her with funds or credit, for ordinary emergencies in a port of necessity. The sum provided was wholly inadequate. (*Am. Ins. Co. v. Ogden*, *supra*. Dissenting opinion of Judge Bronson, in same case, in Supreme Court, 15 Wend. 541. *Van Buren v. Wilson*, 9 Cow. 168, per Sutherland, J.; *Moses v. Sun M. Ins. Co.* 1 Duer, 159.)

3. The master not being the agent of the defendants, but of the plaintiff only, there being no total loss and no abandonment, should have communicated with him, and he, frankly with the defendants, so that they could have relieved the vessel, and enabled her to pursue the voyage. The master was, exclusively, the agent of the owner, in conducting the repairs, and in making the sale. (*Bunson v. Duncan*, 3 Exqr. R. 644; *The Brig Sarah Ann*, 2 Sumner, 215; *Scull v. Biddle*, 2 Wash. C. R. 150.)

4. There is no proof that she was under any lien for repairs, or could have been seized and sold; and even if she was, as the master had a large amount of funds on hand, he could have waited till the owner, or underwriters, had been heard from, and supplied the vessel with further funds to complete the repairs.

5. At the time of the sale of the vessel, the master had in hand cash, to the amount of \$750, derived from the sale of the cargo, (Exhibit 17,) and the whole amount of repairs could not have exceeded \$2,500; indeed, less than half that sum. The master says they would have cost, including revictualling the vessel, from \$2,500 to \$3,000.

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6. The right of the master to sell, in case of extraordinary emergency, is regarded with jealousy and watchfulness; the necessity must be clearly made out, and it must appear that no other course could reasonably have been taken. (2 Phil. on Ins. 3d ed. § 1579.)

7. The master cannot give a bottomry bond, except in a case of extreme necessity, where funds cannot be obtained upon personal credit, or after communicating with the owners; much less, can he sell the vessel, and break up the voyage. (*Heathorn v. Durling*, 1 Moo. P. C. R. 5; *Soares v. Kann*, 3 id. 1; *Glasscott v. Lang*, 2 Phil. Ch. R. 310.)

IV. There was no valid abandonment, nor any thing which rendered an abandonment necessary.

1. She should have been abandoned, if any right to abandon existed at all, when the plaintiff first heard news of her putting into Valparaiso.

2. The long delay, was a waiver of any right to abandon.

3. It was attempted, when it was utterly useless to the defendants.

4. The sale did not dispense with an abandonment, nor convert that into a total, which was only a partial loss before the sale was made. (*Knight v. Faith*, 14 Jurist, 1-1114; S. C. 15, Queen's B. R. 649; 2 Phil. on Ins. 3d ed. § 1576.)

5. The fact of the sale is nothing in this respect, it is the state to which the vessel was reduced, at the time of the sale; and she was clearly, not under any such extreme necessity as to justify a sale or abandonment. (2 Arnould, 1082, 3.)

V. The plaintiff, by receiving the proceeds of the vessel, after notice of the circumstances, ratified the sale, and made it his own, and thereby waived the abandonment, if one had been properly made. (2 Phil. 3d ed. § 1593; *Pearce v. Ocean Ins. Co.* 18 Pick. 83.)

VI. The bottomry bond, given at St. Catherine's, diminished the interest of the plaintiff in the vessel, to the extent of the amount of the bond, being \$3,479.26; and, in fact the loss, to repair which this money was borrowed, was paid by the underwriters. (*Read v. Mutual Ins. Co.* 3 Sand. C. R. 54.)

VII. Even if the plaintiff is entitled to recover, as for a total loss, yet the evidence shows that he has been paid; as, after deducting the bottomry bond, he has received more money from the sale of the vessel, than his remaining interest amounted to.

VIII. The plaintiff is, in any event, only entitled to recover for a partial loss, to be adjusted upon proper principles; the adjustment, given in evidence, contains many improper allowances.

Second, upon the cargo.

1. The underwriters are not liable to the plaintiff for any loss sustained by the sale of the cargo to raise money to pay for repairs. In this case, the plaintiff's property was sold by his own agent, to pay his own debt, or rather to discharge a duty incumbent on himself, to repair his own vessel. In a proper case, it may become the subject of general average, but the underwriters on the goods are not liable. (Hughes on Ins. 289, 90; 1 Phil. on Ins. 2d ed. 708, 4; 2 Arnould, 891, 960, 1343; *Bunson v. Duncan*, 3 Exqr. 646; *Moses v. Sun Mut. Ins. Co.* 1 Duer, 159; *Powell v. Gudgeon*, 5 M. & S. 431; *Sarguay v. Hobson*, 2 B. & C. 5; S. C. 4; Bing. 181.)

2. None of the cargo was injured by any perils of the sea; if injured at all, it was caused by the careless manner of handling it at St. Catherine's, for which the underwriters are not liable.

3. It was the duty of the master to send it forward, as it was not of a perishable character, and he could have done so, but he made no effort whatever to that end. He probably omitted it because he ascertained it would bring very little in California. (*Robinson v. Com. Ins. Co.* 3 Sumner, 220; 2 Arnould, 1020-1028.)

4. The plaintiff also adopted the sale of the cargo, and satisfied it by receiving from the master, who was his own agent, a portion of the proceeds.

Third, upon the freight.

The plaintiff was the principal person who was interested in the cargo, upon which freight was to be earned, as he owned it chiefly himself.

Nearly all the bills of lading specify the cargo as his own.

The whole actual value was about \$10,000.

A part of it was sold at St. Catherine's, by Captain Disney, amounting net to 550 mil-reis, and 277 reis, and the proceeds were paid to Captain Dean.

The residue was held by Captain Dean himself, to raise money for repairs at Valparaiso, as already stated.

I. The vessel not having been injured to half her value, the sale of her, and the breaking up of the voyage having been unjustifi-

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able, it follows, as a necessary consequence, that the loss on the freight was caused by the act of the plaintiff, by his agent, which prevents him from recovering for loss on freight.

II. The omission to continue the voyage, and carry on the cargo, which could have been done within a reasonable time, in which the assured had a right to perform it, or to send the cargo on in another vessel, was the neglect of the plaintiff, and furnishes no ground of claim against the underwriters. (*Herbert v. Hallet*, 3 John. Cases, 93; *Moody v. Jones*, 4 B. & C., 394; S. C. 6 D. & R. 749.)

III. The sale of the cargo was, as has been shown, to discharge the duty of repairing the ship, which was incumbent on the plaintiff, as owner. If it had been the cargo of a stranger, the owner would have been bound to refund the amount.

It cannot be said, therefore, that either the cargo, or the freight upon it, was lost; if they were, it was caused by the voluntary appropriation, to other purposes, by the plaintiff himself. (*Hughes on Ins.* 219, 20; *Bunson v. Duncan*, 3 Exqr. 644.)

IV. The vessel was, in fact, repaired, and ready to proceed on the voyage, and could have done so, if the master had delayed the sale until the owner or underwriters had sent on funds. This destroyed the claim for loss on freight. (*Dickey v. N. Y. Ins. Co.* 4 Cowen, 222; *Center v. Am. Ins. Co.* 7 id. 564.)

V. The plaintiff being the owner of the cargo, by his agent, the master sold it; the plaintiff himself subsequently ratified the sale, and received the proceeds, and this was a voluntary acceptance of the cargo, which, if he had been a stranger, would have bound him to pay freight *pro rata*, and he cannot, consequently, recover for loss of freight. It has, in fact, been earned, and, as the debtor and creditor are the same person, paid. (*Welsh v. Hicks*, 6 Cowen, 504; *Smyth v. Wright*, 15 Barb. S. C. R. 51.)

BY THE COURT. DUER, J. delivered the opinion of the court, and after stating the material facts of the case, proceeded as follows: Whether, upon these facts, the plaintiff is entitled to recover a total loss upon the vessel, is the first and the most important of the many questions, which these cases involve, and it will be necessary for us to determine. If this question shall be decided in favor of the plaintiff, it has been contended, that his

right to recover a total loss upon the cargo and freight, is a necessary consequence; but we think, that there are special circumstances that distinguish this case from those in which this consequence has been held to follow. It will be seen, hereafter, that the questions arising upon the cargo and freight policies are, in reality, distinct, and must, therefore, be separately considered.

The right of the plaintiff to recover a total loss upon the vessel, as we understood the arguments of his counsel, is based upon two grounds.

1st. The inability of the master to procure, at Valparaiso, the necessary funds for repairing the vessel, so as to enable her to prosecute her voyage.

2d. The sale of the vessel, which, under the actual circumstances, it is alleged, was necessary, and, consequently, justifiable. We are, therefore, to inquire, whether, upon either of these grounds, the abandonment can be sustained; for, if not, the complaint upon the vessel policies must be dismissed, or there must be a new trial; and, for the purposes of the discussion, we shall assume that the best exertions of the master, and all that the law requires, were used by him, to raise the necessary funds, and that the vessel, notwithstanding the repairs she had received, was incompetent, when sold, without further repairs, to pursue her voyage. We are not, however, to be understood as saying, that these facts are so clearly established by the evidence, that further proof, in relation to each of them, may not, hereafter, be justly required.

1st. Was the mere inability of the master to procure, at Valparaiso, the funds that he needed for repairing the vessel, a justifiable cause for breaking up the voyage?

When a vessel, disabled by the perils of the sea, is in a port of necessity, and it is ascertained that the cost of her repairs, making the usual deduction, will exceed a moiety of her value, the loss, although, in fact, partial, is total by construction of law, and the owner, if he is insured, and in due season elects to abandon, may demand its payment. His right to abandon is then unqualified and absolute. But it is not upon this ground alone that a vessel rendered innavigable by the perils insured against, may be rightfully abandoned, for although the estimated cost of her repairs may be less than half her value, yet if, by the exercise of that diligence, and the use of those means, which the assured and his

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agents are bound to employ, she cannot be placed in a condition to perform her voyage, it cannot be doubted, that there is a constructive total loss, the payment of which, upon a proper abandonment, may be justly claimed. When the impossibility of making the necessary repairs is occasioned by the want of materials and workmen, it is not denied that such is the law; but we consider the law to be just as clearly settled, that it is quite immaterial, whether the impracticability of making repairs, when the vessel is in a port of distress, proceeds from the want of materials and workmen, or of the necessary funds or credit. It is the existence of the fact, and the necessity of breaking up the voyage, which it creates, that justify an abandonment; and such is not only the opinion of text writers, foreign and domestic, of the highest authority,* but in many adjudged cases has been the language of the Court. (2 Valin, 345, 7; 4 Boulay Paty, 298; 4 Benecke, 241; 2 Arnould, 1081; Tindal, Ch. J. 4 Car. and P. 283; *Reid v. Bonham*, 3 B. and Bing. 159.)

We cannot, therefore, hesitate to reject the position for which the learned counsel for the defendants contended; namely, that the inability of the master to raise the necessary funds for repairing the vessel, must in all cases be attributed to the negligence of his owner, who is bound to furnish him with all the funds or credit that the possible exigencies of the voyage may require. In our opinion no such duty rests upon the owner. It is not pretended that there is any general usage that creates a duty, that in its operation would be an oppressive tax, and, speaking generally, an unnecessary burden. Nothing, it seems to us, would be more inexpedient and unreasonable than to require that the owner shall supply the master with specie funds, (for in a port of necessity letters of credit would probably be unavailing,) equal in amount to three-fourths of the value of the vessel; that is, sufficient to defray the cost of all repairs, short of a constructive total loss, in any port of distress, however distant and obscure, into which the vessel, by the accidents of the voyage, may be driven; for such is, in reality, the extent of the obligation that the argument of the defendants,

* Pothier (*Traité du Con. d'Assur.* n. 126) alone expresses doubts, but his doubts seem to be founded upon the limited construction given by him to the French Ordinance.

followed to its consequences, would impose. We are convinced that the decision in the Court of Errors, in the case of *The American Ins. Co. v. Ogden*, (20 Wend. 287,) the authority on which the counsel for the defendants mainly relied, gives no sanction, nor even countenance, to such a doctrine. Not only was the vessel in that case in her port of destination, but there had been a positive misapplication of the funds that ought to have been applied to her repairs; and it was upon these special circumstances that the judgment of the court was manifestly founded. The fullest, and perhaps the ablest, opinion in that case, is that delivered by Mr. Senator Verplanck; and we entirely concur with him in saying, that, "the broadly stated doctrine, that the want of funds wherewith to make repairs is not a valid cause of abandonment, is not correct as a general rule, but is applicable only to the cases where such want is chargeable to the want of ordinary diligence, or of good faith, on the part of the assured or his agents." (20 Wend. 314.) The true and sole inquiry, therefore, is, what is the measure of the diligence that, for the purpose of repairing the vessel, when repairs are necessary, the master is bound to exercise? when unprovided with funds, what are the efforts that he ought to make? what the means he is bound to employ in order to supply the want? And these questions, to a certain extent, there is no difficulty in answering. If he cannot raise the sums that are needed upon the credit of his owner, or his own, the law not only gives him the power, but makes it his duty, to raise them upon the security of any part, or of the whole, of the property and interests under his control. He may pledge vessel, freight, and cargo, by bottomry, respondentia, or mortgage. (*The Gratitude*, 3 Rob. Ad. R. 355; *The Jacob*, 4 Rob. 245; *The Packet*, 3 Mass. 255; *The Fortitude*, 2 Sumn. 348; *Reid v. Bonham*, 3 Brod. & Bing. 147; *American Ins. Co. v. Coster*, 3 Paige, 843; Abbot on Ship, p. 2, ch. 2, § 5, p. 150; Story on Agency, § 118; 3 Kent's Com. 171-3.) And it is only when all these means have been resorted to with proper diligence, and have proved ineffectual, that he is justified in breaking up the voyage, or his owner, if insured, has any title to abandon. But it by no means follows, from what has now been said, that the diligence and efforts of the master, in procuring the means of repair, are in all cases to be limited to the port in which the disabled vessel has found a refuge. Although nei-

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ther the proper materials or workmen are there to be found, or the requisite funds there to be procured, it is by no means a necessary consequence that he may at once abandon the voyage, and sacrifice, by an immediate sale, the property intrusted to his charge. His obligation to repair the vessel, if reparable at an expense of less than half her value, may still subsist, and his failure to perform the duty, operate to discharge the underwriters from all liability, beyond the payment of a partial loss. If, without any prejudicial delay, or increase of expenses, beyond a moiety of the value, the want of materials or workmen could have been supplied from a neighboring port, or the necessary funds have been obtained by a communication with his owner or consignee, the conduct of the master in breaking up the voyage and selling vessel and cargo, it seems to us, could never be justified, and would furnish no ground for the recovery of a total loss. We select hypothetical cases to illustrate our meaning:

A vessel bound to, and owned in this city, is forced, by stress of weather, into an obscure harbor on the coast of New Jersey, or Long Island. She is so far injured that, without some repairs, she cannot leave the harbor, and the means of repairing her cannot there be found. Is the voyage, at once, to be broken up? the insurers, to be at once charged with a total loss? or, would it not be the plain duty of the master to communicate to his owners, without delay, the actual condition of the vessel? and equally their duty, by the transportation of materials and workmen, to make, without delay, the necessary repairs, and complete the voyage? And when no effort is made to perform these duties, can it be believed, that an abandonment would ever be sustained? Or, take the case of a voyage to a foreign port. An American vessel bound to a port in the Baltic, is damaged by the perils of the seas, and seeks a refuge at Cowes. Materials and workmen there abound, but the master is destitute of funds, and in that small port there is no person able, or willing, to advance them. The vessel and cargo are, however, valuable, the cost of repairs moderate, compared with their value, and by resorting to a merchant or banker in London, the necessary funds may certainly and speedily be obtained. Would it not be extravagant to hold that the master, by limiting his efforts to Cowes, and refusing or neglecting to extend them to London, may convert the partial into a

total loss? And would it not be unreasonable to deny that such neglect would be a violation of duty, a breach of trust, upon which a claim for a total loss could never be founded? These supposed cases, it may be said, bear no very close analogy to that which is before us; but they sufficiently show that the right to abandon, when founded merely on the inability of the master to procure the means of repair in a port of necessity, is not, as when founded on the ascertained cost of repairs, unqualified and absolute. They show that the right is subject to such limitations or exceptions, that the propriety of its exercise, it may be truly said, must depend upon the particular circumstances of each case in which the question arises. The principles that ought to govern the decision of the question, it may not be difficult to state; but there is no fixed and invariable rule; nor, it may be added, any controlling precedent; and it is, therefore, from the nature, terms, and reasonable interpretation of the contract of the parties, that the principles which ought to govern us must be derived. Since wager policies are no longer tolerated, a contract of insurance is emphatically and purely a contract of indemnity; and the interests of commerce, and of the public, require that its true character as such should never be forgotten, and, in all doubtful cases, be strictly maintained. Hence, the breaking up of a voyage ought never to be sanctioned, when it is certain that the ship-owner, if uninsured, would have continued to prosecute it; nor, consequently, the abandonment of a vessel, as innavigable, ever be sustained, when it is certain that the owner, if uninsured, would have elected to repair. When the policy is valued, it may frequently happen that the breaking up of the voyage, if a total loss may be recovered, would be far more advantageous to the ship-owner, than its successful termination. It is plain, that in these cases, there is a direct temptation to dishonesty and fraud; nor can it be doubted, that this is a temptation which it is the duty of a court of justice, as far as possible, to remove. So long as the valuation in the policy is held to be conclusive, it cannot be wholly removed; but its force may be greatly lessened by confining the power of abandonment, within those limits, which the nature and objects of the contract, the intention of the parties, and the dictates of reason and policy, evidently prescribe.

The true principle upon which the whole doctrine of abandon-

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ment may be said to rest, and by which alone its application, in converting a partial into a total loss, can be justified, is that which, in the leading case of *Anderson v. Wallis*, (2 M. & Sel. 240,) is stated by Lord Ellenborough, with his accustomed brevity and force. It is, that an abandonment is never to be authorized, except when, at the time, the loss was actually total, or, in the highest degree, probable; and if we analyze the cases that have settled the law, as it now prevails in England, we shall find that it is this principle that runs through, explains, and justifies them all. To select an example from each class of cases. When the vessel insured is captured, there is an actual total loss; but, as she may be recaptured or restored, an abandonment is necessary to warrant its recovery; a title must be vested in the insurers to give them the benefit of the "*spes recuperandi*." But when the vessel is stranded, the question whether the loss shall be deemed partial, or so far total as to warrant an abandonment, will depend upon the nature and extent of the peril in which the vessel is involved, and the probable difficulty, hazard, and expense of attempting to deliver and repair her. When it appears that by proper exertions she might have been gotten off, and have been fully repaired at a moderate cost, the abandonment is void, and a partial loss only can be recovered; and to warrant the recovery of a total loss, it must be proved that the delivery of the vessel from the peril was, upon reasonable grounds, judged to be impracticable, or not to be effected, unless at an expense that would absorb her value. In other words, it must be proved that a loss actually total, although not then existing, was in the highest degree probable. (*Fontaine v. Phoenix Ins. Co.*, 11 Johns. 295; *The Sarah Ann*, 2 Sumner, 255.) We shall not deny that in the United States we have departed widely from the sound doctrine of abandonment, by extending to the vessel that moiety rule which, in its original application, was confined to the goods, and which, thus confined, had itself no other foundation than the existing probability of an eventual total loss; but although an error, which has proved a most fruitful source of litigation, and has broken up, at the expense of the underwriters, numerous voyages, that, uninsured, would have been completed, has become a part of our established law, we cannot see, that this affords any reason whatever for departing from the general law of insurance in cases, which the moiety rule, as ex-

tended and expounded by our courts, has failed to embrace. We do not believe that constructive total losses, as giving a right to abandon, ought to be multiplied by any further violation of the principle by which alone their introduction into the contract of insurance can be defended or explained. We must, therefore, hold that in all cases of damage or disaster to the ship from the perils insured against, other than the cases to which the moiety rule may with certainty be applied, the question, whether the vessel was justifiably abandoned and sold, or ought to have been repaired, must be determined by a reply to the inquiry, whether the condition of the vessel was such as to justify the belief that all efforts for enabling her to resume the voyage would be fruitless, or that the delay, difficulties, and expenses attending them would be such, that a total loss was a highly probable result. We do not say that it is necessary that the inquiry be made in the exact form that has now been stated. On the contrary, we approve, and would adopt in preference, that mode of submitting the question which for many years has prevailed in England, and which, in the case of *Irving v. Manning*, the most recent that we have found, was expressly sanctioned by the court of last resort. The question which, according to this decision and many which preceded it, the jury should be required to answer, and upon their answer to which their verdict will depend, is whether a prudent owner, if on the spot, and uninsured, in the exercise of a sound judgment, would have broken up the voyage and sold the ship, or have elected to repair? (*Irving v. Manning*, 1 H. of L. Cases, 78; *Somners v. Sugrue*, 4 Carr. & Payne, 284; *Doyle v. Dallas*, 1 Mood. & Rob. 44; *Gardner v. Salvador*, 1 id. 116; *Donett v. Young*, 1 Carr. & Marsh. 465; 2 Arnould, 1087, 1093, 1096, 1109, 10, 11.) Substantially, the question has the same meaning as that of the probability of a future total loss, since it is only when a total loss is believed to exist, or to be highly probable, that a prudent owner, uninsured, would decline to repair.

It follows, from this form of submitting the question, that it is not enough that the jury are satisfied that in the case before them the master acted in good faith, and in the honest belief that the course he followed was the best for the interests of all concerned. In the language of Lord Tenterden, (1 Mood. & R. 54,) the underwriters are not to be held liable, unless the jury are convinced, not

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only that the judgment of the master was honestly formed, but that, under the circumstances in which he was placed, it was the best and soundest judgment that could have been formed.

It may possibly be said, that in the cases to which I have referred, the cause turned entirely on the question of the validity of the sale of the vessel, as made by the master, and not on that of the right of the assured to abandon; but as it is only when there is a constructive total loss, which justifies the breaking up of the voyage, that the sale of the vessel can be justified as necessary, the questions are in truth identical, nor, when the abandonment has not been made until the sale has taken place, can they be separated.

That in cases of stranding, the course that an owner uninsured, in the exercise of the best judgment, would have followed, furnishes the correct test of the right of the assured to abandon, has been distinctly admitted, both by Mr. Justice Story, (*The Sarah Ann*, 2 Sum. 215,) and by Chancellor Walworth, (*American Ins. Co. v. Ogden*, 20 Wendell, 302;) and we are not aware that any reason can be given why the test may not, with equal justice, be applied to every case in which an absolute right to abandon is not established by conclusive proof that the cost of repairs would have exceeded half the value; and by limiting its application to such cases that conflict of inconsistent rules, which Chancellor Walworth has deprecated, will be wholly avoided: no such conflict can arise.

Let us now apply the observations that have been made to the case before us.

For aught that appears, the condition of the vessel at Valparaiso, was one of entire safety, and it is proved that the master might have communicated with his owner in this city, by the Panama route, and have received an answer within eighty, at the utmost ninety, days from the date of his letter. We are bound to presume that the plaintiff, upon being informed of the exact situation of the vessel, and of the inability of the master to make the repairs she needed, could and would have remitted to him the necessary funds, either in bills or by opening a credit in his favor with a house in Valparaiso. Let an additional month be allowed for repairing the vessel, and another, for the time that would have elapsed from the arrival of the vessel at Valparaiso until the

failure of the master to raise there the funds that he required. We have thus five months, as the full period that would have elapsed, had the course that has been indicated been followed, from the first arrival of the vessel at Valparaiso, until she would have been fitted, by sufficient repairs, to resume the voyage. And the question, therefore, is, whether the fact that this, or even a greater delay in the resumption of the voyage, must have intervened had the master elected to remain at Valparaiso until he obtained from his owner the funds that he required, created of itself, independent of any other circumstances, a constructive total loss that warranted the master in breaking up the voyage, and justified an abandonment by his owner?

We are satisfied, both upon principle and upon the authorities, that, to this very material question, no other than a negative answer can be given. The mere continuance of a disabled vessel in a port of necessity, where she is in actual safety, and is not exposed to further perils, furnishes no evidence whatever that, in the event, the partial loss will become total; and it is, doubtless, for this reason that it has been frequently decided, that a suspension of the voyage merely temporary, is, in no case, a valid ground of abandonment of the vessel, nor, unless the goods are perishable, even of the cargo. In the cases of *Anderson v. Wallis*, (2 M. & Sel. 240,) and *Everth v. Smith*, (id. 247,) the voyage was suspended by the detention of the vessel in port for nearly six months, and yet, in each case, the abandonment was held to be void, and a partial loss only to be recoverable. In the case of *Bradlie v. The Delaware Insurance Co.*, (12 Peters, 400,) in which Mr. Justice Story delivered the judgment of the Supreme Court of the United States, the foregoing, and other cases, are carefully reviewed, and the learned Judge, speaking in the name of the court, deduced from them the following, as the true and established doctrine. His language is, that "the mere retardation of the voyage, by perils insured against, not amounting to, nor producing, a total incapacity of the vessel, eventually, to perform the voyage, cannot, upon principles well established, be admitted to constitute a technical total loss, which will authorize an abandonment." He adds, that "a retardation for the purpose of repairing damages from the perils insured against, the damages not exceeding a moiety of the value of the ship, falls directly within the doctrine."

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It is not possible for us to say, that the application of this established doctrine, to the present case, is at all varied, or affected, by the fact, that when the master resolved to sell, instead of repairing the vessel, the voyage, from the sale or damaged condition of the cargo, had ceased to be worth pursuing. In other words, that it was no longer possible that the plaintiff, either as the owner of the vessel or of the cargo, could derive, from the further prosecution of the voyage, the benefits he had expected. It is true, that, in the time of Lord Mansfield, the loss of the voyage, as the loss of its anticipated profits was termed, in *Goss v. Withers*, (2 Burr, 683,) *Hamilton v. Mendez*, (id. 1198,) *Milles v. Fletcher*, (1 Douglas, 237,) and in many other cases, was held to be a valid and sufficient cause of abandonment, even of a ship; but not only were these cases directly opposed to the prior decision in the House of Lords, in *Pole v. Fitzgerald*, (Willis' Rep. 641; S. C. in error, 5 Brown, P. C. 131,) but they have since been expressly overruled by many decisions in the English courts and in our own. The established doctrine now is, that the insurance is not on the voyage, but merely on the ability of the ship to perform the voyage. The meaning of the contract is, not that the voyage, as to its beneficial results, shall not be defeated, but that the vessel shall not be prevented from completing it, by the perils insured against; and, in judgment of law, the vessel is not so prevented, so long as she remains in the possession of the master, and although disabled, may be and ought to be repaired. (*Parsons v. Scott*, 2 Taunt. 363; *Faulkner v. Ritchie*, 2 M. & S. 290; *Brown v. Smith*, 1 Dow. P. C. 359; *Naylor v. Taylor*, Danson & Lloyd R. 248; *Alexander v. Baltimore Ins. Co.* 4 Cranch, 370; *Huston v. Phoenix Ins. Co.* 1 Wash. C. C. R. 400; *Ritchie v. Mutual Ins. Co.* 12 Peters, 405; 2 Arnould, 1064-1071; 2 Phillips, 8d ed. 255-258.) It is a necessary conclusion, from the remarks we have made and the authorities we have cited, that the delay in the prosecution of the voyage that would have resulted from the detention of the vessel for repairs, even combined with the fact that the objects of the voyage, as a mercantile adventure, were wholly defeated, was insufficient to justify the proceedings of the master, and, consequently, to warrant the claim of the assured for a total loss. Looking to these facts alone, we are clearly of opinion that the case belongs to the class of those in which it has been held that it was the plain duty of the master to have communicated with his

owner, before he resolved on breaking up the voyage and selling the ship, and that his neglect, in the performance of this duty, entitled his owners to repudiate his acts; and we agree entirely with Mr. Phillips, that, in such cases, it is a partial loss only that can be recovered from the underwriters. Proceedings that would have been void as against his owners, if uninsured, can never be treated by them, when insured, as valid against the underwriters. (*Tanner v. Bennett*, 1 R. & M. 182; *Scull v. Bridle*, 2 Wash. C. C. R. 150; *Pierce v. Ocean Ins. Co.* 18 Pick. 83, 2 Phillips, 3d ed. p. 307, § 1678; *The Fanny and Elmira*, Edwards' Adm. R. 119.)

But although the claim of the plaintiff for a total loss cannot, we think, be sustained upon the evidence now before us, it is possible other circumstances may have existed, which, if proved upon the trial, taken in connection with those that have been proved, would have entitled him to the judgment he demands. It may still be true, that the real state of the facts was such, that the detention of the vessel at Valparaiso, until the master could communicate with his owner and receive his answer, would have rendered a loss actually total, in the highest degree probable. It may be, that from the insecurity of the harbor, the season of the year, the action of worms upon her bottom, or other causes, the vessel, during her necessary detention for repairs would have been exposed to such additional hazards that a prudent owner, uninsured, in the exercise of a sound discretion, would have determined to sell, instead of repairing her. No proof in relation to these facts was given upon the trial that has been had; but, as it is alleged that the proof exists, we think it will not be unreasonable to grant a new trial, for the purpose of enabling the plaintiff to produce it, unless upon some other ground his claim for a total loss can be sustained.

2d. The next inquiry, therefore, is, whether the sale of the vessel created, of itself, a total loss, for which the defendants are liable; and we reply that, according to all the authorities, such could not be the effect of the sale, unless it was rendered necessary by the perils insured against, or was in itself an act of barratry. It has been truly said by an eminent Judge, "that there is no such head of insurance law as a loss by sale." Bayley, J., (1 Mood. & Rob. 19,) and the meaning is, that unless the facts that precede the sale constitute a constructive total loss, none can arise from the fact of

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sale, however disastrous in its result to the owner, for which the insurers can be made responsible. In the words of Mr. Arnould, "the mere fact of a sale, irrespective of the state of the ship which made it necessary, can never give the assured a right to abandon," (12 Arnould, 1082,) and in those of Mr. Phillips, "that if the circumstances rendering a sale necessary do not constitute a total loss, a sale by the master will not make it such, unless it is a case of barratry," (2 Phillips, 305, § 1571, 3d ed.) and the language of these judicious writers is fully borne out by the cases to which they refer, and which we deem it needless to cite.

The good faith of the master, in the case before us, is undoubted, and hence the sole question is, whether the sale of the vessel, as made by him, was justified by a necessity constituting a constructive total loss. The allegation is, that the creditors, by whom the partial repairs on the vessel had been made or furnished, had acquired a lien which the master was unable to discharge, and which they threatened to enforce, and, consequently, that a sale by the master was necessary to prevent a forced sale by process of law. But, admitting that the facts thus relied on have been sufficiently proved, it is impossible to say that the necessity which they created was a consequence of the perils insured against, since it is manifest that it arose entirely from the voluntary and injudicious acts of the master, in ordering repairs to be made when he was unprovided with funds to defray their cost. Nor is this all; even where a lien for repairs is properly created, its existence furnishes no ground for an abandonment; nor is a partial converted into a total loss, even when the lien is enforced by a sale of the vessel under an admiralty sentence. To prevent a sale, by the discharge of the lien, is the duty of the owner, and the underwriters are not responsible for a loss not attributable to the perils insured against, but exclusively to his neglect, or that of his agents. (*Thornlley v. Wilson*, 2 B. & Ald. 313; *Depau v. Ocean Ins. Co.* 5 Cow. 63; *Bradley v. Maryland Ins. Co.* 12 Peters, 398; *Williams v. Suffolk Ins. Co.* 3 Sumn. R. 310; *Humphrey v. Union Ins. Co.* 3 Mass. 429.) We are, therefore, clearly of opinion that, unless the abandonment can be sustained upon grounds wholly independent of the sale of the vessel, and of the supposed necessity by which it is sought to be justified, it is a partial loss only that the plaintiff will be entitled to recover.

3d. The objections that have been urged on the part of the defendants to the recovery, in any event, of a total loss, must next be considered. If these objections, or any of them, are valid, instead of ordering a new trial, the loss, as partial, must be properly adjusted, and a final judgment be rendered for its amount.

There is no weight in the objection, so far as appears from the evidence now before us, that the abandonment was improperly delayed. The plaintiff was not bound to abandon when he first received the intelligence of the arrival of the vessel at Valparaiso. He had, in truth, no right to abandon, until he was informed that the voyage was broken up, and the vessel sold, in consequence of the inability of the master to procure the funds for her necessary repairs. The letter containing this information was probably not received by him until late in the month of December, and we cannot say that his abandonment, on the 8th of January following, was not made in due season. There was no delay by which the defendants could have been prejudiced.

The next objection is, that the right to abandon, if it existed at all, was divested by the sale of the vessel, before the abandonment was made. Where the total loss is claimed, on the sole ground of the innavigability of the ship, the underwriters, it is said, may defeat an abandonment, by electing to make themselves all necessary repairs; and if this be true, it follows, that to enable them to make this election, the abandonment must be made while the vessel still remains in the possession of the assured. It cannot be said that this doctrine is unreasonable in itself, or is destitute of authority; but, although it seems to have been adopted by the Supreme Court of Massachusetts, it was, in our judgment, decisively rejected by our own Court of Errors, in the leading case of *Center v. The American Ins. Co.* (7 Cow. 564; S. C. 4 Wendell, 45.) The law, in this state, we consider now settled in conformity to the opinion of Mr. Justice Story, that the right of abandonment is not a shifting right, dependent upon the will of both the parties, but that where it has once rightfully attached, its exercise by the assured, cannot be prevented or defeated by any act or offer on the part of the underwriters. (*Peel v. The Merchants' Ins. Co.* 3 Mason, 29.)

Nor can we hold, that the right of abandonment, in the present case, was divested by the election of the master to repair. Had

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the repairs been completed, or so far completed, as to render the vessel capable of resuming the voyage, such, undoubtedly, would have been the result. (*Dickey v. The New York Ins. Co.* 4 Cowen, 222; *Humphrey v. The Union Ins. Co.* 3 Mass. 429; *Benson v. Chapman*, 6 Man. & Gr. 792.) But as the repairs made were only partial, and, as we infer from the evidence, left the vessel still unseaworthy, we see no reason to doubt that she was as properly a subject of abandonment, in her actual condition, as if no attempt to repair her had ever been made.

The question, whether the existence of a prior lien, created by a bottomry, is a bar to an abandonment, is not, under the circumstances of the case, necessary to be considered.

If the voyage was rightfully broken up, the sale that followed was plainly justifiable; and if, in the event of the recovery of a total loss, the defendants will be entitled to be credited, as salvage, with the whole proceeds of the sale, deducting only its necessary expenses, it is evident that the mere fact that a bottomry bond had been previously in force, will furnish no ground of complaint. As it appears from the evidence, that the whole of the partial loss that gave rise to the bottomry, has been satisfied by the defendants, it seems a necessary consequence that, if chargeable with a total loss, they will be entitled, on the settlement of its amount, to the credit that has been stated.

The objections, on the part of the defendant, being thus disposed of, we retain the opinion, that the purposes of justice require that, in the actions on the vessel policies, a new trial shall be granted; and we add, that, upon such trial, the right of the plaintiff to recover a total loss, will depend upon the answer that shall be given by the jury to the following question, namely, Whether, when the vessel was sold, the probability that a loss actually total would ensue, should she be detained in port until the necessary funds for her repairs could be procured, and the repairs be made, was such, that a prudent owner, uninsured, in the exercise of a sound judgment, would have decided, instead of repairing the vessel, to relinquish the voyage?

4th. The questions that arise, upon the cargo and freight policies, will not long detain us.

Even should the right of the plaintiff to recover a total loss upon the vessel be conceded or established, it seems to us evident

that, upon the facts now proved and admitted, he cannot be entitled to recover a total loss of the cargo. It is true that the cargo was lost to him by its sale, and that this loss was total, diminished only by the net proceeds of the sale; but the proximate cause of the loss was the sale itself; and this, as it was not an act of barratry, was certainly not a risk covered by the policy; and if a consequence at all of the perils insured against, it was a remote and accidental, not a direct and necessary, consequence. The cargo was not sold on account of its damaged condition, but for the single purpose of raising funds for repairing the vessel; and without a violation of principle, and a disregard of the authorities, we cannot hold that the insurers on the cargo are liable for the loss that resulted. It is not a loss within the terms and spirit of their contract. The law is thus settled by decisions, of which the authority has not been denied; and we know of no distinction that can exempt the present case from the application of the doctrine that they establish. (*Powell v. Gudgeon*, 5 M. & Sel. 481; *Sarquay v. Wilson*, 4 Bing. 131; *Moses v. The Sun Mutual Ins. Co.* 1 Duer, 159.) It has been said that as the inability of the master to procure the funds that he needed, existed when the vessel arrived at Valparaiso, the loss was at that time constructively total; that it is to this period, therefore, that the abandonment, when made, must be construed to relate, and that by its retrospective force, the master became, from that time, the agent of the defendants alone,—their agent in the sale of the cargo as well as of the vessel, (2 Phillips, 3d ed. § 1732, p. 1223; *id.* 3d ed. § 1708, and cases cited, pp. 395, 398,) but from this view of the rights and relations of the parties we are forced to dissent. In our opinion, there was no right of abandonment, no constructive total loss, until the master determined to break up the voyage, in consequence of the failure of his efforts to procure the necessary means for its prosecution; until then, the master acted solely as the agent of the plaintiff, with a sole view to the protection of his interests in the completion of the voyage. The sale of the cargo, therefore, as made by him, was, in judgment of law, the act of the plaintiff,—as truly so, as if he had directed it in person.

It has also been contended that, as the vessel was never repaired, and it is proved that no other could have been procured to carry

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on the cargo to its port of destination, it may justly be considered as having been, in fact, lost from the perils insured against, and the defendants be precluded from setting up its prior sale as a defence, since, in all events, its sale must have been ordered; but upon what principle underwriters can be made liable for a loss that would have happened from a peril insured against, had it not already taken place from a different cause, we are unable, we must confess, to understand. If goods insured free from capture, are seized and taken possession of by the enemy, and the ship that contained them having been released, and suffered to proceed on her voyage, founders at sea, we cannot believe, that an action for the recovery of a total loss could be maintained against the underwriters on the goods, upon the ground that, had they not been taken by the enemy, they would have perished with the ship.

Had a third person been the owner of the cargo, in the case before us, its sale would have given him an immediate right of action, for the recovery of its value, against the plaintiff, as owner of the vessel, and, assuredly, his right of action would not have been divested by the subsequent breaking up of the voyage. Let it be admitted that in the events that have happened, he would have had an election to seek the recovery of his loss in an action against his insurers, or against the plaintiff. In all cases, where such an election is given to the assured, his insurers, upon payment of the loss, are subrogated to his rights and remedies against the vessel and its owners, (*Marsh on Ins.* 242; 2 *Phillips*, 419; 3 *Kent's Com.* 371 n.;) but where the same person is the owner of both vessel and cargo, as in the case before us, it would be absurd to permit him to recover a loss for which he would himself be immediately liable to the very persons from whom its recovery is sought. To permit a recovery in such a case, would, in the words of Lord Denman, be a scandal, as well as an absurdity; and to avoid a circuitry of action that would justify the scandal, such a recovery is never allowed. (*Wulmsley v. Cooper*, 2 *Ad. & Ellis*, 222; *Connop v. Levy*, xi. *Queen's Bench R.* 760; *Turner v. Davies*, 2 *Williams' Saunders*, 150, note.)

But although the claim of the plaintiff to recover a total loss of the cargo cannot, in our opinion, be admitted, it seems not improbable that he has sustained, and is entitled to recover, a partial loss of a considerable amount. It appears that the cargo, when unladen at Valparaiso, was found to be greatly damaged, but what

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was the extent of this damage, and whether it was occasioned by the perils insured against, are questions which are left in uncertainty, and which, as the case now stands, we have neither the means, nor the power, to determine. That they may properly be submitted, to and determined by a jury, there must be a new trial in the actions upon the cargo, as well as upon the vessel policies.

It follows, from the observations that have already been made, that there can be no recovery at all upon the freight policies, and, consequently, that the complaints in these actions must be dismissed. The loss of the freight must be wholly ascribed to the voluntary act of the master, in selling the cargo; and the loss, although total, was no more a consequence of the perils insured against than that of the cargo itself. The freight from New York to Valparaiso was necessarily lost by the sale of the goods, from which it was to arise; and there is no evidence, nor is it pretended, that had the vessel been repaired, any freight would have been earned on her voyage from Valparaiso to her port of destination. Hence, it is a total loss that the plaintiff is entitled to recover, if he has any right to recover at all; and as the question of his right is determined against him, it would be idle to grant a new trial that could lead only to the same result, as our present decision.

New trial upon vessel and cargo policies, costs to abide event.
Complaint upon freight policies dismissed with costs.

JOHN R. BLAKISTON and another v. JOHN G. DUDLEY and others.

The defendants, in consideration that the plaintiffs would furnish to one Ackley such coal as he might from time to time require, promised to accept the bills drawn upon them by Ackley, in favor of the plaintiffs, for the price of coal so delivered. A bill for \$658.37 was drawn upon them by Ackley, for coal so furnished, which, upon its presentment by the plaintiffs, the defendants refused to accept.

Held, that the promise of the defendants, not being in writing, was void, under § 8 of the Rev. Statutes, relating to promissory notes and bills of exchange.

Held, that the plaintiffs were not within the exception created by § 10 of the Statutes, as they had neither drawn, nor negotiated, the bill in question.

Held, that the exception only applies to those who, having transferred a bill for value, have, in consequence of its non-acceptance, been rendered liable as drawers or endorsers.

Complaint dismissed with costs.

(Before OAKLEY, CH. J., DUKE and BOSWORTH, J.J.)

February, 1856.

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THE action was brought to recover damages for the wrongful refusal of the defendants to accept and pay a bill of exchange, drawn upon them by one Ackley, in favor of the plaintiffs.

The complaint averred, in substance, that the defendants, in consideration that the plaintiffs, who are coal dealers in Philadelphia, would furnish to Ackley all the coal that, from time to time, he might require, for the purposes of a manufactory carried on by him, promised and agreed that they would accept and pay the drafts of Ackley for such coal, to be drawn on them in favor of the plaintiffs, and payable four months from date.

That the plaintiffs, relying on this promise, had furnished Ackley, from time to time, with large quantities of coal, and that there being a balance due from him for coal so furnished, he, for the purpose of satisfying the same, drew and delivered to them the following draft upon the defendants :

"\$656 $\frac{17}{100}$.

NEW YORK, August, 2d, 1854.

"Four months after date, please pay to the order of Messrs. Blakiston & Cox six hundred and fifty-six $\frac{17}{100}$ dollars, value received, which place to account of

"A. L. ACKLEY.

"To Messrs. DUDLEY, JACOBSON & CHURCHILL,
No. 47 Broadway, N. Y."

That the plaintiffs endorsed this draft, and caused it to be presented to the defendants, who refused to accept the same, and that afterwards, on the 8th of December, 1854, when the draft matured, it was presented to the defendants for payment, and payment was refused. Judgment was demanded for the amount of the draft, with interest from its maturity.

The answer of the defendants takes issue on all the material allegations in the complaint.

The cause was tried before Oakley, Ch. J., and a jury, in May, 1855.

The following are the material facts of the case, as proved upon the trial.

The plaintiffs, in 1853, sold one Ackley divers cargoes of coal, for consumption at his factory at Sag Harbor, for which they were paid by his drafts on the firm of J. G. Dudley & Co., of New York,

of whom the defendants became the successors. Subsequently thereto Ackley made a contract with the plaintiffs to purchase of them three cargoes of coal for the price of \$4.05 per ton, to be delivered before the first day of July, 1854, and to be paid for in cash in thirty days, "or by draft, four months," with interest at the rate of six per cent per annum.

The contract was put in writing, but, before its execution, was taken by Ackley and the plaintiffs' agent to the defendants' office: when it was exhibited to defendants, the price of the coal and its cheapness, the amount wanted by Ackley, and the other terms of the contract, were fully discussed, and finally one of the defendants being asked if he would accept Ackley's drafts for coal, as they had the year before, replied that they would, whereupon the contract was forthwith executed between Ackley and the plaintiffs' agent.

Subsequently, after some of the coal had been delivered, a delay took place in the delivery of the residue, owing to the plaintiffs' giving a preference to other customers; whereupon Ackley went to Philadelphia, and not being able to induce plaintiffs to deliver the coal prior to July 1st, made a new arrangement with them, by which he agreed to pay thirty cents per ton more for the coal than the price stipulated in the original contract, and to accept a delivery of the same after July 1st, whenever it should be convenient to the parties, and to pay for the same in cash. It did not appear that the defendants were ever cognizant of this alteration in the original contract, or that they ever assented thereto.

On the 2d August the coal was shipped, and was received soon after by Ackley, at Sag Harbor. About the last of September, Ackley failed. About the middle of November he drew the draft in the complaint set forth, for the amount of the shipment of August 2d, (making up the amount by charging the coal at the enhanced price,) which, being soon after presented to defendants, was refused acceptance. It was also presented for payment, which was refused. When the testimony on the part of the plaintiffs was closed, the counsel for the defendants moved for a dismissal of the complaint, upon the following grounds:—

1st. That, as Ackley was the primary debtor, the promise of the defendants was collateral, and, not being in writing, was void under the statute of frauds, and

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2d. That the defendants were discharged by the alterations made in the contract, as to the price and time of performance.

The motion was denied, and the counsel excepted.

The jury, under the direction of the court, found a verdict for the plaintiffs for \$670.42, the amount claimed, with interest, subject, however, to the opinion of the court, at General Term, upon all questions of law arising upon the facts in evidence.

P. T. Woodbury, for the defendants, insisted that the verdict ought to be set aside and the complaint be dismissed, and, after arguing fully upon the grounds taken on the trial, he contended, that the promise of the defendants, to accept the bill in question, if all other objections failed, was certainly void under the provisions of the Revised Statutes, in the statute relative to promissory notes and bills of exchange, (2 R. S. p. 763, § 608.)

E. S. Van Winkle, for the plaintiffs, claimed that they were entitled to judgment upon the verdict, and after arguing at length to show that the objections taken on the trial were untenable, he insisted that the provisions in the Revised Statutes that had been referred to, ought to be liberally construed in favor of drawers and endorsers in joint faith, and that thus construed, the plaintiffs were brought, by the proof, within the exception contained in the 10th section of the statute. They had given value for the draft, and had endorsed it, and therefore had negotiated it.

BY THE COURT. DUER, J.—We do not think it necessary to decide the questions to which the arguments of counsel, on the hearing before us, were chiefly directed, and which alone were raised upon the trial; namely, whether the promise of the defendants ought not to be regarded as collateral, and, therefore, void under the statute of frauds; and, whether, if the promise was valid, they were not discharged from its performance, by the alterations made, without their assent, in the terms of the contract between the plaintiffs and Ackley. In relation to these questions, we content ourselves with saying, that, in leaving them undetermined, we are not to be considered as intimating, that they are free from difficulty—neither of them is so.

The only objection to the recovery of the plaintiffs that we shall

consider is that which was raised, for the first time, on the argument before us, but which, as properly arising upon the facts, we were bound to entertain; and to this we are forced to say that no answer, that we can deem satisfactory, has been given. The objection is, that even upon the supposition that the promise of the defendants, to accept the bill in suit, was valid at common law, and not void under the statute of frauds, and that they were not discharged from the obligation it created by the alleged change in the terms of the contract between the plaintiffs and Ackley, it is still certain, that the promise was rendered void by those provisions in the Revised Statutes to which we were referred, and which I shall now cite.

The sixth section of the title "Of Promissory Notes and Bills of Exchange" declares, that "no person within this state shall be charged as an acceptor on a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent;" and the eighth, that "an unconditional promise, in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance, in favor of every person who, upon the faith thereof, shall have received the bill for a valuable consideration."

The tenth section, however, of the same title, creates an important exception from these provisions, by declaring that "they shall not be construed to impair the right of any person to whom a promise to accept a bill may have been made, and who, on the faith of such promise, shall have drawn or negotiated the bill, to recover damages of the party making such promise, on his refusal to accept such bill."

It seems to us that these sections are, all of them, free from obscurity or ambiguity, and that it is scarcely possible to state a reasonable doubt as to their true meaning and construction.

The promise of the defendants, upon which this action is founded, if unconditional, which may be doubted, was not in writing, and hence, unless we can hold that the plaintiffs drew, or negotiated, the bill in suit, they cannot be entitled to recover. They were not the drawers of the bill, and we cannot say that it was negotiated by them, without giving a meaning to the word "negotiated" that we cannot believe it has ever borne, and are satisfied, it was not designed to bear in the statute.

We think, that to negotiate a bill can only mean to transfer it for

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value, and that it is a solecism to say, that a bill has been negotiated by a payee, who has never parted with its ownership and possession. The fact, that the plaintiffs had given value for the bill when they received it, only proves its negotiation by the drawer—its negotiation to, and not by them. As to the allegation that they endorsed the bill, as they never delivered the bill to any person, with the intent of rendering themselves liable as endorsers, it is certain that they never endorsed it, in the legal sense of the term. Their putting their names upon the back of the bill, was not an endorsement, but a mere authority, to the agent whom they employed, to demand its acceptance and payment.

The manifest intention of the legislature, in § 10, was to create an exception, in favor of those who, having transferred a bill for value, on the faith of the promise of the drawee to accept it, have, in consequence of his refusal to accept, been rendered liable, and been subjected to damages, as drawers or endorsers.

Thus construed, the exception is reasonable and just, but, upon the construction that we have been urged to adopt by the counsel for the plaintiffs, the exception would, in effect, supersede the rule, since it would be difficult to imagine a case that it would not be found to embrace; that is, difficult to imagine a case in which an oral promise to accept a bill would not be as binding, and create, substantially, the same liability, as a promise in writing. The salutary provisions in sections six and eight would thus be rendered nugatory.

The plaintiffs, here, have not been made liable as endorsers, and have done no act by which they could be rendered so.

The verdict must, therefore, be set aside, and, as no purpose could be answered by a new trial, a judgment, dismissing the complaint, with costs, must be entered for the defendants.

Judgment accordingly. .

BURRALL v. DE GROOT, impleaded with PATON.

A complaint, that a party "made" his promissory note in writing, that the other defendants "endorsed it in blank, and the same, so endorsed, was delivered to the plaintiff, who now holds and owns the same," imports, that the maker delivered it to the payees, and the last endorser to the plaintiff.

The fact, that a defendant's answer denies the receipt of notice of protest, does not make a notary's certificate of the fact of service inadmissible as evidence.

When, to an action on a note, usury is set up in the answer, without its being stated whether it is set up as a defence or counter claim, it will be deemed to be set up as a strict defence, and that only, and the answer will not be taken to be true, merely because it is not replied to.

When a party purchases accommodation paper, at less than its face, on representations, made by the parties to it, that it is business paper, and on which he relies, he is entitled to recover the whole sum payable, by its terms, although it exceed the amount paid for it, with the legal interest thereon.

(Before OAKLEY, CH. J., DUKE and BOSWORTH, J.J.)

February 28, 1856.

THIS action comes before the court, on an appeal by De Groot, from a judgment entered upon a verdict recovered against him, by the plaintiff.

It was tried before Mr. Justice Slosson and a jury, the 30th of March, 1855. The pleadings were as follows:

Plaintiff avers that the defendant, Paton, heretofore, for value received, made his promissory note in writing, dated July 10, 1854, whereby, four months after date thereof, he promised to pay to the order of the defendants, Joseph Carpenter and George R. Jaques, under their firm name of Carpenter & Jaques, one thousand dollars; that said firm of Carpenter & Jaques, and the defendant, De Groot, severally endorsed said note, in blank, and the same, so endorsed, was delivered to plaintiff, who now holds and owns the same; that, at the maturity thereof, the said note was presented to the maker thereof, for payment, and payment thereof refused, of which the defendants, Carpenter, Jaques and De Groot, had due notice; that said note remains due and unpaid. Wherefore plaintiff demands judgment against the defendants, for the sum of one thousand dollars, with interest from November 13, 1854, besides protest, fees and costs of suit.

The defendant, answering the complaint herein, by Skeffington Sanxay, his attorney, denies that the promissory note, in said complaint mentioned, was made for value received. And he denies, for want of knowledge, or information sufficient to form a belief, that said note was presented for payment, and payment refused, as alleged in said complaint, and he denies that he had due notice thereof.

This defendant further saith, that said note was made without any consideration, and for the accommodation of Carpenter & Jaques, and lent to them; that this defendant endorsed the same for their accommodation, and without any consideration ever being received therefor; that Carpenter & Jaques passed the same to the plaintiff, and he received the same, in contravention of the laws of the state of New York against usury, and upon a corrupt and unlawful reservation, and agreement to reserve, a sum greater than seven per cent., for the loan, use, or forbearance of money: to wit, the sum of three-and-one-quarter per cent. per month. Wherefore, and by means of the premises, said plaintiff became, and was, and is, an unlawful holder of said note, and of the endorsement of this defendant thereon, and this defendant is entitled to have his name cancelled therefrom, and his liability discharged; and he demands judgment that the complaint be dismissed, as against him, and that his name be cancelled and discharged from said note.

When the jury was empanelled, defendant's counsel moved to dismiss the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, which motion was denied.

He then moved for judgment, on the ground that his answer contained counter claims not replied to, which motion was denied. To each decision he excepted.

The making and endorsement of the note in suit were then admitted. The plaintiff then read, in evidence, a notary's certificate of presentment, demand of payment of the note, and of notice of protest to the endorser.

Its reception and admissibility were objected to, "on the ground that the defendant having denied, (in his answer,) the service of notice of protest, the notary's certificate was not evidence of such service." The objection was overruled, and the decision excepted to.

Evidence was then given as to the question of usury, and tending to show that the note was bought by the plaintiff, relying on the truth of representations made by the parties, that the making and endorsement of the notes were business transactions.

Proof of actual service of the notice of protest on De Groot, was given by the person who served it.

Some other exceptions, of minor importance, were taken.

None were taken to the charge of the court.

The jury found a general verdict for \$1,029.71, and found, specially, that the sum paid for the note when first negotiated, was \$900.

A judgment was entered for the larger sum. All the defendants appealed. But the appeal was prosecuted by De Groot only.

S. Sanxay, for appellant.

J. E. Burrell, for respondent.

BY THE COURT. BOSWORTH, J.—The complaint states facts sufficient to constitute a cause of action. The averment that Paton made the note, is equivalent to saying that he signed it and delivered it to the payees.

The allegations that the payees and De Groot "severally endorsed said note, in blank, and that the same, so endorsed, was delivered to plaintiff, who now holds and owns the same," would, on a liberal construction of language, be understood to mean, that the payees endorsed it to De Groot, and that he endorsed it to the plaintiff. (Code, § 467 and § 159.)

This language of the complaint should be most liberally construed, inasmuch as the answer avers that the note was, in fact, delivered to the plaintiff by a party to it. The word endorse imports a delivery, and the averment that the plaintiff has the possession of, and owns the note, in connection with those that precede it, is equivalent to saying that it was delivered by the payees to De Groot, and by De Groot to the plaintiff. *Griswold v. Laverty*, (12 L. Ob. 316,) is conclusive upon this point, so far as the judgment of this court is concerned.

No objection was made, at the time, that the notary's certificate of presentment and protest, did not conform to the statute, or was

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not proper or sufficient evidence to prove those facts. That objection cannot be taken now. If taken at the trial, *non constat*, but other evidence would have been given. The objection taken was, that the fact of "service of notice of protest" could not be proved by the notary's certificate, on the ground, that such service had been denied by a sworn answer. Service of it was subsequently proved by the person who made it. The objection actually taken is untenable. (*Arnold v. Rock River Valley R. R. Co.*, decided January term, 1856.) *Ante p.*

The allegations of usury contained matter of defence, and, if true, constituted, at law, a flat bar to the action. If true, they showed that the plaintiff never had a right of action.

The answer does not, in terms, state that these facts are pleaded as a counter claim. If they are a counter claim, within the meaning of that word, as used in § 150 of the Code, it follows that they were admitted, by the plaintiff's failure to controvert them, by a reply, and the defendant might have moved, on notice, for such judgment as the facts stated entitled him to. (Code, § 154.)

If they are to be viewed as a defence, and not a counter claim, they were put at issue by the Code, as upon a direct denial, or were avoided, as if new matter had been alleged sufficient to avoid them. (Code, § 168.)

When the facts, alleged in an answer, may possibly constitute a counter claim, but are such as always constituted a flat bar, at law, to the plaintiff's right to recover, by showing, if true, that he never had any cause of action, they should be deemed to be set up as a defence merely, unless the answer expressly states that they are set up by way of counter claim. A verdict and judgment upon it, in favor of the defendant, would fully protect him against a future action. To preclude a plaintiff from a recovery, on the idea that he has admitted the allegations of such an answer to be true, by omitting to reply to it, when the same allegations, viewed as a full defence, and that only, would be put at issue by the Code, would operate as a surprise in all actions in which the defence of usury is interposed.

None of the exceptions taken to the admission or rejection of evidence are tenable.

The Judge, at the trial, could not withdraw the case from the consideration of the jury. There was evidence, on which it was

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necessary they should determine what the truth was, in relation to the facts controverted. There was, therefore, no error in refusing to direct a verdict to be found for the defendant.

It was expressly conceded, on the argument, that the charge itself was unexceptionable. No exception was, in fact, taken to any part of it. The case is before us upon an appeal from the judgment only, and not from any order denying a new trial, on the ground that the verdict is not contrary to evidence. Such an appeal presents only questions of law, and no others have been raised on the argument before us.

The jury having found that all the parties to this paper represented it to be business paper, that the plaintiff bought relying on the truth of these representations, and that the transaction was not a device to evade the laws against usury, the rights of the parties are the same as if it were, in fact, business paper.

The verdict, on such a state of facts, was, properly, given for the face of the note. The judgment must be affirmed.

GILDERSLEEVE v. MAHONY, impleaded.

When a plaintiff, in an action against a firm, in order to prove that the endorsement of its name was written by one of its members, reads a portion of one of the firm's answer, which states such to be the fact, but also alleges other facts, which, if true, would be a defence to the partner whose answer is so read, the latter is entitled to have the other parts of the answer, which present such defence, read as evidence in his own behalf.

But although the Judge, at the trial, rules the contrary, a new trial will not be granted for that reason, if the plaintiff subsequently proves, by clear and uncontradicted evidence, facts which would render such defence wholly unavailing.

In such a case, the court can see that the error could not, possibly, have prejudiced the defendant.

(Before OAKLEY, CH. J., and DUNE and BOSWORTH, J.J.)
February, 1856.

THIS action came before the court on an appeal, by Mahony, from a judgment on a verdict rendered against him, in favor of the plaintiff. It was tried before Mr. Justice Slosson and a jury, on the 24th of May, 1855.

It was brought upon a note dated the 2d of August, 1854, made by defendant Paton, payable four months after its date, to the order of the defendants, Carpenter & Jaques, and endorsed in blank by that firm, and by defendant Vancleve, and the defendants Auliffe & Mahony, and transferred to the plaintiff so endorsed. It was for \$1,000. Defendant Mahony was one of the firm of Auliffe & Mahony.

The complaint was in the same form, substantially, as the one in the case of *Burrall v. De Groot*. *Ante*, 379.

The answer of Mahony stated, that Auliffe endorsed the note, in his firm's name, without a consideration, for the accommodation of Carpenter & Jaques, and without the knowledge or assent of Mahony, and that Paton also signed it, as maker, for the like accommodation.

For a further and separate defence, it states the accommodation, making and endorsement of the note, and that, when first negotiated, Carpenter & Jaques transferred it to Charles Burrall, on a discount of it at the rate of three-and-one-quarter per cent per month, Burrall knowing, when he took it, that it was accommodation paper.

It further alleges that Burrall is the real party in interest in this action, and that plaintiff received it from Burrall, for the purpose of suing it in his own name for the benefit of Burrall. The complaint concludes thus:

Wherefore, and by means of the premises aforesaid, the said plaintiff became, and was, and is, an unlawful holder of said note, and of the endorsement of the firm of this defendant thereon. And this defendant is entitled to have his name, and the firm name of this defendant, and his and the liability of his firm discharged; and he demands judgment that the complaint be dismissed as against him and his firm, and that his name and that of his firm, be cancelled and discharged from said note.

The counsel for the plaintiff was proceeding to open the case, when Mr. Sanxay, of counsel for the defendant, moved that the complaint be dismissed, on the ground that it does not contain facts sufficient to constitute a cause of action against this defendant.

Which motion being denied, said counsel excepted.

Said counsel then moved for judgment on the record, that the complaint be dismissed, on the ground that the answer contains a

counter claim, and a demand for affirmative relief, and sets forth, affirmatively, the substantive facts of a complaint, to vacate a promissory note for usury, and prays the same judgment that would be proper in an action brought for that purpose, and that the same is not replied to.

Which motion being denied, said counsel excepted.

The counsel for the plaintiff then offered the note mentioned in the complaint in evidence.

To which the said counsel for the defendant objected, on the ground that the answer denies, and puts in issue, the endorsement of the firm name of McAuliffe & Mahony, and the fact that said parties were a firm at all, in so far as said endorsement is concerned.

But the said Justice ruled, that the endorsement is sufficiently admitted by the answer.

To which ruling said counsel excepted.

Said counsel for defendant then moved, that, inasmuch as the admission of the defendant in the answer, if said answer contains one, must be taken together as a whole, the contemporaneous assertion by the defendant, in the answer, which goes to his discharge, or to show that he is not liable, must be received with and as part of the admission, and as evidence of his discharge, and he again moved to dismiss the complaint.

But the said Justice ruled, that the defendant must make out his discharge, or show that he is not liable as endorser, by affirmative proof, and he denied said motion.

To all which said counsel excepted.

Said counsel for defendant then moved, that said defendant have the affirmative of the issue, and that he be considered as opening, and be permitted to close the case.

But the said Justice ruled, that, as to the opening and closing the case, it is a matter of discretion with the court, and he will allow such motion if defendant admit plaintiff's case; otherwise, not.

To all which said counsel excepted.

The counsel for the plaintiff then read said note, and the name of McAuliffe & Mahony endorsed thereon, to the jury, under the exception of the defendant's counsel, and then, proving the interest on the note, rested his case.

The said counsel for the defendant then moved for a dismissal
D.—V.

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of the complaint, or a nonsuit, on the ground that the plaintiff had failed to make out a case against the defendant by competent proof.

But the said Justice denied said motion.

Whereupon said counsel excepted.

The said counsel for the defendant then called Charles Burrall, Jr., who, being sworn, testified: I know the plaintiff; he was formerly engaged in the business of discounting paper; he has failed; he now has charge of the Empire Iron Works; I believe he has made a general assignment of his property, but I don't know when; I don't recollect when he made his assignment. The note in suit being shown to witness, he said: I have seen this note before; it came to me about the second of August last; I received it from George R. Jaques, one of the firm of Carpenter & Jaques, the payees of the note.

Being cross-examined, he said: I afterwards sold the note to Gildersleeve, the plaintiff; I sold it to him about thirty days before it became due; he gave me his check on the Irving Bank for it, less interest seven per cent.

Redirect.—He has never retransferred the note.

Robert Paton, being sworn, testified: I know the parties to the note; I am the maker of the note; I made it for the accommodation of Carpenter & Jaques; I delivered it to Mr. Jaques; I never received any value for it from any one; I know McAuliffe & Mahony; they are stone-cutters; I never passed it to them.

George W. Stevens sworn: I am acquainted with McAuliffe & Mahony; they are, and were at the time of the making of the note, stone-cutters.

The defendant here rested.

The counsel for defendant asked the court to charge the jury, that the defendant was entitled to a verdict, on the grounds stated in his opening, and that it was incumbent on the plaintiff to show an assent of both of the members of the firm to the endorsement, or that the note was passed in the regular course of business, or within the scope of the business of the firm; that the note was shown to be an accommodation note, for the benefit of the payees, Carpenter & Jaques, who negotiated it, and that it never was shown to be in possession of defendant; and that the plaintiff's title coming from Carpenter & Jaques, the payees, he was chargeable with knowledge that the endorsers of the note were accommodation endorsers, and

was sufficient to put him upon his inquiry, in regard to the parties subsequent to the payees, and, if he neglected to make inquiry, he took no better title than the payees had; and, moreover, that the endorsers, under the circumstances, must be regarded only as guaranties, and that their guaranty is void.

But the said Justice refused so to charge, and directed the jury to find a verdict for the full amount of the note, with interest.

To all which said counsel for defendant excepted.

Judgment having been entered on the verdict, the defendant, Mahony, appealed to the General Term.

S. Sanxay, for appellant.

J. E. Burrell, Jr., for respondent.

BY THE COURT. BOSWORTH, J.—The complaint states facts sufficient to constitute a cause of action, and judgment should not have been ordered for the defendant, on the pleadings, for the reasons stated in the opinion of the court, in the action of *Burrall v. De Groot*, impleaded with *Paton*. *Ante* 379.

Whether there was error in holding that the plaintiff, by reading a part of the answer setting up a separate defence, as an admission of the endorsement of the note by defendant's firm, did not make the other allegations, of that part of the answer, evidence in favor of the defendant, of the facts alleged, it is unnecessary to decide.

For, assuming that the defendant had a right to read the whole of that part of the answer, as evidence of the truth of the facts it affirmed, the exception to the decision, refusing permission to read it, is obviated, by proof, subsequently given, that the plaintiff bought the note, and paid full value for it, before its maturity. There being no pretence that he had notice, at the time, that it had been endorsed and negotiated by one of the partners, for purposes foreign to the partnership, the plaintiff was entitled to recover.

If the plaintiff had given evidence of that fact in the first instance, and which was wholly uncontradicted, the court would have been justified in excluding evidence tending to prove the facts set up in that part of the answer. It was agreed, on the argument, that the only part of the answer, which defendant claimed the right to read, is comprised between folios ten and twelve of the case,

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inclusive. Those allegations present the defence first set up in the answer.

It would have been proper, in the case supposed, to have excluded such evidence, unless the defendant proposed to go further, and prove notice to the plaintiff of the misappropriation of the endorsement.

If the defendant is right, in his position, that the plaintiff, by reading that part of the answer containing the first defence, as evidence that the note was endorsed by the firm, made the other allegations evidence of their truth, then it was clearly necessary for the plaintiff to give further evidence, before he would be entitled to recover. In that view, he held the affirmative of the issue. So, too, if the endorsement, by the firm, was, as he contends, denied by the answer, the plaintiff was bound to prove it.

In either way of viewing it, the plaintiff held the affirmative of the issue. And supposing the plaintiff to have read the whole of the answer setting up the first defence, and thus, while proving that the name of defendant's firm was written by one of its members, also gave evidence tending to show that the note was endorsed and negotiated out of the firm's business, without the knowledge of the defendant Mahony, still the plaintiff would be entitled to recover, on proving that he became the holder of it, before maturity, for value, and without notice of the fraud practised on the defendant by his copartner.

An erroneous ruling, when the plaintiff rested, that the defendant was bound to prove the matters averred, in the part of the answer read, in discharge of his liability, is not one for which the judgment should be reversed, as evidence was afterwards given, which was wholly uncontradicted, and which entitled the plaintiff to a verdict, admitting all the matters alleged, in such part of the answer, to be true, as therein stated.

The judgment, in this action, should also be affirmed.

EVARISTE TEXIER v. THEODORE GOUIN and LEOPOLD J. BOECK.

Where the defence, relied on at the trial, differs, in its entire scope and meaning, from that set up in the answer, the court has no power to treat the variance as immaterial, or to direct the answer to be amended, or the fact to be found according to the evidence.

If proof of such a defence, although objected to, is admitted by the court, a verdict for the defendant, founded thereon, will be set aside, as contrary to law.

The Code, in defining the requisites of an answer, has abolished the general issue, as formerly understood, and has, therefore, abolished the rules that formerly prevailed, as to the matter that might be given in evidence under that plea.

The only effect of a general or special denial of the allegations of a complaint, is to cast the burden of proof upon the plaintiff; but when that proof is given, no evidence of a defence, not set up in the answer, can be received.

New trial, costs to abide the event.

(Before OAKLEY, CH. J., DUKE and BOSWORTH, J.J.)

February, 1856.

THIS was an action by the plaintiff, as endorsee, against the defendant Gouin, as maker, and the defendant Boeck as endorser, of a promissory note, for \$1,800, dated 5th June, 1854, and payable to the order of Boeck, four months after date.

The complaint was in the usual form, and contained all the allegations necessary to charge the defendants. The answer admitted the making, endorsement, &c., of the note, but set up, as a defence, that it was without consideration, had been transferred to the plaintiff merely as a collateral security, and had been obtained by false representations.

The cause was tried, upon the issues raised by these pleadings, before Oakley, Ch. J., and a jury, in April, 1854.

The plaintiff, after producing and reading the note, and proving the amount due thereon, rested.

The defendant Gouin was then sworn, as a witness, on behalf of the other defendant, and, after stating that the note was given for merchandise, he was asked whether the note had been paid. The counsel for the plaintiff objected to the question, on the ground, that the defence of payment was not set up in the answer; but the court overruled the objection, holding that, under the power of

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amendment, given by the Code, the evidence might be received: and the counsel duly excepted to the decision.

The witness then swore, positively, that he paid the note, in full, on the evening of the day on which it bore date.

Another witness was then sworn, on behalf of both defendants, who testified, substantially, to the same facts. This evidence was also objected to, the objection overruled, and an exception to the decision duly taken.

Some evidence was then given, on the part of the plaintiff, tending to discredit the testimony of the witnesses for the defendants.

Upon the question of payment, the cause was submitted to the jury, who found a verdict for the defendants.

The plaintiff appealed from the judgment, on this verdict, and the appeal was heard, upon a case containing the pleadings, and the proceedings and exceptions, on the trial.

J. N. Balestier, for plaintiff, appellant.

The only defences, set up in the answer, are, that the note was delivered to the plaintiff as collateral security, and also was obtained by false and fraudulent representations. Payment was not merely a distinct, but an inconsistent defence; and the Judge, therefore, erred, in not excluding the evidence. (*Fagon v. Davison*, 2 Duer, 253; *Cutlin v. Hanson*, 1 Duer, 329. Bosworth, J.)—This is not a case in which proof that the plaintiff was misled, or surprised, could justly be required, under § 169 of the Code. It is not a case to which that section applies.

H. H. Morange, for defendants, respondents.

After the payment, in full, by Gouin, the plaintiff's possession of the note was wrongful, and proof of payment was, therefore, proper, to show that he was not its lawful owner and holder; it was also proper, to show that he had no cause of action when he commenced the suit, and it was competent, under the pleadings. (*Welt v. Ogden*, 13 John. R. 56; *Sill v. Rord*, 15 John. 231; 2 John. 346.) It is, also, a conclusive reason, for not granting a new trial, that no affidavit that the plaintiff was misled was made, on the trial.

BY THE COURT. OAKLEY, CH. J.—Upon reflection I concur with my brethren, that, under the pleadings in this case, proof of the payment of the note ought not to have been received, and that I had no power, under § 169, or any other section, of the Code, either to amend the answer, so as to warrant the admission of the proof, or to treat the variance, which it created, as immaterial. It is true, that the language of § 169 is broad enough to embrace every possible discrepancy, between the proof and the pleadings, so as to make it the duty of the court, upon a trial, either to amend the pleading, or disregard the variance, in every case, in which it is not proved, to its satisfaction, that the adverse party was actually misled, to his prejudice, in maintaining his action or defence. But the general words of this section, and of section 170, are controlled and limited by those of § 171, which declare, that, where the cause of action, or defence, is unproved, “in its entire scope and meaning,” it shall not be deemed a case of variance, within the sections immediately preceding, but a failure of proof; and it is scarcely necessary to add, that such a failure, in all cases, entitles the adverse party to a verdict or judgment. In the case before us, not only were the defences, in the answer, “unproved, in their entire scope and meaning,” but they were actually disproved, even by the witnesses for the defendants; and not only was the defence, of which proof was received, entirely new and distinct, but it was directly inconsistent with those which the answer alleged. This case is, therefore, much stronger than that of *Cullin v. Hanson*, (1 Duer, 297,) in which Mr. J. Bosworth held, with the concurrence of his brethren, that, where the defence set up, in the answer, is unproved, “in its entire scope and meaning,” the court, at the trial, has no power, under sections 169 and 170 of the Code, either to direct the pleading to be amended, or the fact to be found according to the evidence. It follows, that there was no evidence before the jury, in this case, upon which they could legally found a verdict for the defendants, and that, upon the only proof legally before them, the plaintiff was entitled to recover.

The cases cited by the counsel for the defendants, as they were decided before the Code, are wholly inapplicable. It is not to be denied, that under the old system of pleading, in an action like the present, the defendant, under the general issue, might give in

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evidence any matter, as a bar to a recovery, which tended to show that the plaintiff had no subsisting cause of action when he commenced the suit; and this rule, undoubtedly, embraced proof of payment. (1 Chitty on Plead. 472; *Welt v. Ogden*, 13 John. 58; *Bird v. Carlat*, 2 John. 346.) But the Code, by requiring that an answer, in addition to a general or specific denial of the allegations in the complaint, when such a denial is made, shall state any new matter constituting a defence, when such a defence is meant to be relied on, has effectually abolished the general issue, as formerly understood; and that payment is, in its nature, as truly a matter of defence, as a release, or accord and satisfaction, or duress or fraud, we cannot doubt. Even before the Code, it might always be specially pleaded; under the Code, it must be. (Code, § 149; *Kearslake v. Morgan*, 5 Term R. 512; 2 John. ut supra.) The only effect of a general or specific denial in an answer of the material allegations of the complaint now is to cast the burden of proof upon the plaintiff, but where the necessary proof is given, if the answer contains nothing more than such a denial, the plaintiff is at once, and as a matter of course, entitled to a verdict or judgment.

We do not think that the answer in this case contains any denial of any material allegation in the complaint, and as it has, therefore, no resemblance to a general issue, the remarks that I have just made may seem to be unnecessary; but they may not be without use in correcting some misapprehensions, which, notwithstanding the plain language of the Code, apparently still linger in the minds of many of the profession.

The judgment for the defendants is reversed, and there must be a new trial, with costs to abide the event.

ISLES v. TUCKER.

In an action between partners, for an accounting, when the complaint alleges, and the partnership agreement states, that the plaintiff contributed \$2,250 of capital, and the answer denies that the \$2,250 was contributed as capital, and avers that it was to be paid by the plaintiff for an equal interest in the business, that the money was paid on that basis, and that both parties have acted upon the understanding that such was the meaning of the agreement, the allegations of the answer are sufficient to present the issue, whether the agreement was, by mistake, so drawn as not to express the actual agreement of the parties.

When the written agreement of parties is clear and unambiguous in its terms, clear proof of a mistake is required, to justify the court in holding, that it does not express the actual intent and contract of the parties to it.

Declarations of a defendant, not made to the plaintiff, are not evidence for the defendant, and declarations of the plaintiff's agent, who negotiated the contract, made subsequent to the transactions to which they related, and not forming part of the *res gesta*, are not admissible against the plaintiff on the trial of such an issue.

(Before OAKLEY, CH. J., and DUEK and BOSWORTH, J.J.)

February 23, 1856.

On the 27th day of April, 1850, the plaintiff and defendant entered into a copartnership, for the purpose of conducting a dining saloon, or refectory, at 145½ and 147 Bowery, in this city, which had been previously conducted by defendant. The partnership was to continue until the first of May, 1853.

This action was commenced by plaintiff for the purpose of enforcing an accounting on the part of defendant. Five causes of action are set forth in the complaint. The second cause of action arises, as plaintiff claims, out of the fact that defendant converted to his own use the money which plaintiff put into the concern as capital. Defendant admits, in his answer, the appropriation of this money, and justifies it on the idea that the money in question was paid to him for the purchase of a half interest, and was not put into the concern as capital.

The action was tried before Mr. Justice Duer, without a jury, on the 5th of November, 1854.

Without passing upon the other questions at issue, the court, at Special Term, decided that the defendant had a right to appro-

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prate the \$2,250 to his own use, and that this sum, paid by plaintiff, was not to be regarded as "capital." From this part of said decision plaintiff appealed. The court directed a reference as to the other causes of action.

The articles of copartnership were recited at length in the complaint. So much of them as is necessary to illustrate the point controverted at the trial reads thus, viz.:

This agreement, made on the 27th day of April, 1850, between Elihu L. Tucker, of the city of New York, the party of the first part, and Catharine Isles, of the said city, the party of the second part, witnesseth, that the parties hereto do hereby agree to form a copartnership for conducting the business, ordinarily conducted in a dining saloon or refectory, to be located at Nos. 145½ and 147 Bowery, in said city, and known and designated as the Philadelphia House; that the said business shall be conducted under the firm of E. L. Tucker & Co., and that the said copartnership shall continue until the first day of May, 1853, unless it should be sooner terminated by the mutual consent of the said parties.

The said party, of the first part, hereby agrees to put in as capital, into the concern, all the furniture and fixtures, which are now on the first and second floors, and in the basement of said buildings, an inventory of which is hereunto attached, and to which reference is made, at a valuation which shall be mutually agreed upon, by and between the parties hereto. And the said party, of the second part, hereby agrees to contribute as capital to the concern, the sum of twenty-two hundred and fifty dollars in cash.

And the said parties further agree, and in consideration of the covenant herein made, that the profits which may accrue during the existence of this copartnership, shall be equally divided by and between the parties hereto, after deducting all necessary expenses, required for the successful prosecution of the business aforesaid.

The complaint alleges, that the \$2,250, agreed to be paid by the plaintiff, as her share of the capital, was paid as follows:—Fourteen hundred and eighty dollars on the execution and interchange of duplicates of the above agreement, twenty dollars shortly thereafter, and the balance was intended and supposed to be paid by her refraining to draw any share of the profits of the business

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until the defendant, Tucker, had first drawn out and applied to his own use the sum of fifteen hundred dollars, she being under the mistaken idea that that arrangement would settle the account equitably between herself and him.

The answer of the defendant, among other, contained these allegations, viz.:

Secondly. That the plaintiff did not contribute, as capital, to the concern, the sum of twenty-two hundred and fifty dollars, in cash, or any other sum whatever.

That the meaning of the partnership articles, in this respect, was, that this sum should be regarded as so much to be paid, by the plaintiff to the defendant, for an equal interest in his business, as then existing and established, and all matters and things appurtenant thereto, and that upon this understanding of the said articles the plaintiff and defendant both acted; that no money, paid in by the plaintiff, was paid in upon any other basis.

That, even though the covenant in the said articles, in this respect, might seem to imply differently, it was not executed or acted upon in that sense, by either the plaintiff or defendant.

That the plaintiff did pay one thousand four hundred and eighty dollars, in cash, on account of the purchase of an equal interest—with the defendant—in the said business, and that the balance of the said twenty-two hundred and fifty dollars—the sum agreed to be given therefor—was drawn out of her part or portion of the partnership profits, and that all the allegations of the complaint, to the contrary hereof, are untrue, as, or in manner and form as therein made.

Several witnesses were examined. The nature of the testimony given, by each of them, except that of Alexander W. Smith, is sufficiently stated in the opinion of the court; that of Smith is given, at length, and is as follows:

Alexander W. Smith, a witness called by the plaintiff, being sworn, proves the execution of paper produced. The paper was then read, and marked Exhibit No. 1, for plaintiff. This was the partnership agreement.

Being examined, by counsel for defendant, the witness then said: I was employed, by the parties, to draw up the partnership agreement between them; the original oral understanding was, that the sum of two thousand two hundred and fifty dollars should

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be considered as paid for the acquisition of a half interest in the furniture and fixtures of defendant's establishment; that parties supposed such was the provision in partnership articles, and that, under that impression, they carried out their oral understanding, instead of the original reading of the original article.

To all this the plaintiff's counsel objected, but the court admitted the foregoing and succeeding evidence, subject to future objection, and the examination proceeded with that understanding. The witness continued: The agreement was executed in duplicate; it was executed at my place of business, 59 Rose street; I drew the papers, at the instance of both plaintiff and defendant; I am not a lawyer.

Here the counsel for defendant handed a mortgage to witness. The witness said: This mortgage appears to have been executed on the same day with the agreement; that mortgage was drawn by me, with the agreement, and executed on same day with copartnership articles; don't recollect, if it was executed at same time; I am a subscribing witness. The mortgage was upon the plaintiff's undivided half of the partnership property, and was given to secure the payment of \$750, with interest, on the 1st of March, 1851, and was dated the 27th of April, 1850.

Here the mortgage was read, and marked Exhibit No. 2, for defendant.

Witness continued: I don't recollect, if there was any other paper executed; I now think the mortgage was executed two or three days after the agreement; between \$1,400 and \$1,500, cash, was paid, in my presence, on account of agreement; I don't know when the partnership terminated; the \$750, in mortgage, was the residue of the purchase money; the mortgage for \$750 was given to secure the balance of \$2,250 capital; I don't recollect, if any thing was said, as to the value of partnership property; I do not understand its value; don't remember there was any agreement as to value; don't recollect, if receipt passed, on payment of the \$1,480; Alexander Isles, the brother of the plaintiff, represented her; I represented Tucker, and he was there himself; Miss Isles paid for the mortgage; the partnership articles Tucker agreed to pay for, but did not; I was employed by Tucker to procure him a partner, and was to receive \$100 for it; I received \$50; it was paid me for procuring Tucker a partner.

Being examined by Mr. Clinton, in reply to the question, Were any instructions given by Mr. Tucker, before you drew the agreement? the witness replied: There were; those instructions are embodied in that paper; I submitted them to Tucker, two or three days before it was executed; Tucker said he wanted to submit it to an attorney; I left it with him. The agreement, before referred to, marked Exhibit 1, for plaintiff, being here produced, the witness said: Both parties examined the paper, for an hour, before execution, on the morning it was executed; the copy given to Tucker was an exact copy of the agreement, except that the paper was originally drawn for one year, and extended to five; Tucker made no other objection, and I think Mr. Isles made that.

Being again examined by counsel for the defendant, he said: My father, Silas C. Smith, Mr. Munson, and Alexander Isles, were present at the execution of the agreement; Munson read one copy, and I the other, aloud; I never saw Miss Isles before the execution of agreement; Mr. Isles negotiated with me for Miss Isles—acted as agent; saw Miss Isles before the execution of agreement; I saw her a month or two afterwards; Alexander Isles, her brother, negotiated with me, for her, and represented her; he brought her there, on the morning these papers were consummated; I was frequently in the establishment after the partnership commenced; never saw her in the business; Alexander Isles was there acting; he was behind the bar receiving money.

Smith was subsequently further examined, but testified to no new fact.

The testimony having been concluded, the cause was summed up, by the respective counsel, and the court, on the 6th of January, 1855, made the following order:

“This cause having been duly called on for trial before the Hon. John Duer, one of the Justices of this Court at Special Term, without a jury; and the court having elected to try only the issue raised by the pleadings on the question of capital, and intimated that all the other questions should be tried before a referee; to which course the counsel of the respective parties assented—

“After hearing the testimony of the witnesses of the respective parties and their counsel, and mature deliberation having been had, it is adjudged that the sum of twenty-two hundred and fifty dollars was the consideration to be paid to the defendant for the

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one-half or equal interest with the defendant in his business as then existing and established, and not as an addition to the capital; and that the defendant had a legal right to apply the whole sum of twenty-two hundred and fifty dollars to his personal use.

"It is ordered, that all the questions of account, and such other questions as are put in issue by the pleadings, be referred to John L. Mason, Esq., to take proof thereof, and report the same, with his opinion thereon, to this court.

(A copy,)

"GEO. H. E. LYNCH, Clerk."

Whereupon, the plaintiff appealed from so much of the above order as adjudges "that the sum of \$2,250 was the consideration to be paid to the defendant for the one-half or equal interest with the defendant in his business as then existing and established, and not as an addition to the capital; and that the defendant had a legal right to apply the whole sum of \$2,250 to his personal use."

H. L. Clinton, for plaintiff.

R. D. Holmes, for defendant.

BY THE COURT. BOSWORTH, J.—The plaintiff seems to have tried this action on the theory, that the evidence given by the defendant was open to the objection, that its object was to contradict, by parol evidence, the clear terms of a written agreement.

The evidence, if admissible for any purpose, was admissible to establish the fact, that the executed contract was, by mistake, so drawn as not to express the contract as it had been actually agreed upon. Assuming that the pleadings were such as to authorize the reception of such evidence, there was none given except that of A. W. Smith.

He does not state what the parties said when he was instructed to draw the contract. He says the mortgage "was given to secure the balance of \$2,250 capital." He assumes to state what "the original real understanding was," but on what facts or declarations of the parties that opinion is based, he does not state. That can not be said to be enough to justify the conclusion, that the written contract, which is clear and unambiguous in its terms, does not express the true meaning and intent of the parties.

Whether the \$2,250 was to be contributed as capital, or was to be paid for an undivided half of the stock, fixtures, and good-will, is a question to be ascertained. The contract says it was to be contributed as capital. That is higher and more satisfactory evidence than any thing contained in the evidence of Smith. The form and terms of the mortgage, with other evidence of what the parties to the contract said, at the time of concluding it, in connection with evidence of the practical construction given to it by their subsequent acts, might establish beyond doubt the fact of a mistake. No such declarations or subsequent acts are proved.

The testimony of Eagleson, much of that given by Hays, most of Johnson's, and of Foster's, and that of Hunter, was incompetent. It consisted either of declarations of the defendant, which could not be evidence in his own favor, or of declarations of the plaintiff's agent, made subsequent to the transactions to which they related, and forming no part of the *res gesta*.

We think the allegations of the answer sufficient, to present the issue, whether the agreement was, by mistake, so drawn as not to express the actual agreement of the parties.

That it is advisable, that the order made should be set aside, and the whole action be referred to determine all the issues joined in it. If neither the \$1,500 first paid or advanced by the plaintiff, nor the \$1,500 of profits subsequently drawn out by the defendant, are charged to him on the books of the company, and if no credit to the plaintiff is found there, by reason of the \$1,500 advanced, those facts, in connection with the mortgage and its terms, would be very strong evidence that the \$2,250 was not to be advanced as capital, but was to be paid as the contract price for an undivided interest.

The order must be reversed, that, upon an application at Special Term, the whole issue may be referred.

JAMES LEE and BENJAMIN C. LEE v. MOSES H. GRINNELL,
ROBERT B. MINTURN, and others.

On the night of the 26th December, 1853, the sails, masts and spars of the ship "The Great Republic," then lying at a wharf in the port of New York, accidentally caught fire, and such was the progress of the flames that their destruction was certain, and from the frequent falls on the deck of fragments and flakes of fire, the firemen refused to go on board. The masts, &c., were accordingly cut away, but a spar, which was on fire, in falling, pierced the decks, and set on fire both ship and cargo, in the hold and between-decks.

Duer and Hoffman, J.J., differed on the question, whether the cutting away of the masts, &c., was a voluntary sacrifice, creating a loss to be contributed for in a general average. Campbell, J., declined to express an opinion upon the question.

Held, however, by all the Judges, that as the effect of the cutting away of the masts, &c., was not to preserve any of the property at risk, for any period of time, from the peril in which it was involved, no loss, either to the ship or cargo, that was caused by the fire alone, was to be contributed for in the settlement of a general average.

As the progress of the fire could not, by any other means, be stopped, the ship was scuttled, and sunk ten feet, until she struck bottom. She continued to burn above, and was burnt to the water's edge. It was proved, that both the ship, and large portions of the cargo, sustained damage from the scuttling, that otherwise might not have been incurred.

Held, that the scuttling was a voluntary act, and the losses that resulted, proper subjects for contribution, and, consequently, that every loss to ship or cargo that could be distinctly traced to the scuttling, as its proximate cause, was to be contributed for in the new adjustment of the general average ordered by the court.

By the agreement of all the parties interested, both ship and cargo, in their damaged state, were placed in the hands of the defendants, and were sold at public auction, and questions arose as to the interests bound to contribute, in the adjustment of a general average, and the value upon which each ought to contribute.

Held, that under the special circumstances of the case, the actual proceeds of the sale, deducting all necessary and proper charges, must be adopted as the contributory value of each interest, with the addition of the sum that each would be entitled to receive in contribution from the others.

Held, that as the voyage was not commenced, and the loss of freight could not be attributed to the circumstances creating the general average, the freight was neither to contribute, nor be contributed for.

Ordered a reference for the adjustment of the general average, upon the principles laid down by the court.

(Before DUER, CAMPBELL and HOFFMAN, J.J.)

Heard, December, 1855; decided, February, 1856.

THIS was an action for the recovery of the proceeds of the sale of a large quantity of mess beef belonging to the plaintiffs, and sold by the defendants on their account. The sum claimed, as the proceeds, was \$14,486.89, deducting \$380, as the commission of the defendants.

The defence was that the beef, upon the settlement of a general average, to which it was subject, was found liable to contribute the sum of \$11,841.70, and that, deducting this sum and the commissions of the defendants, the sum due to the plaintiffs was only \$2,214.75, which the defendants offered to pay. The cause was tried before Oakley, Ch. J., and a jury, in May, 1855.

Upon the trial the Chief Justice, by consent of the counsel for the respective parties, directed a verdict for the plaintiffs, subject to the opinion of the court at General Term. A verdict was thereupon found for \$14,056.45 damages, and \$1,500 interest, subject to the opinion of the court on the questions of law arising upon the adjustment of the general average, and subject, also, to the adjustment of the amount of the verdict, by the court, with liberty to turn the case into a bill of exceptions. It was also ordered that the questions of law be heard, in the first instance, before the court at General Term.

The plaintiffs, at the trial, after reading the pleadings, which are stated in the opinion of the court, rested; whereupon the counsel of the defendants read, in evidence, a statement purporting to be an adjustment of the general average in the case, the matters of fact in which are to be taken as testified to by the master and officers of the ship, having knowledge thereof; but no conclusions of law therein are to be regarded. Such adjustment is as follows:

STATEMENT OF GENERAL AVERAGE, CASE OF THE SHIP "GREAT REPUBLIC," L. MCKAY, MASTER.

Whilst this ship was lying at the foot of Dover street, in the city of New York, with nearly all her cargo on board, destined for Liverpool, and with all her sails bent below her royals, on the night of the 26th December, 1853, a fire broke out in Front street, one block from the ship, and nearly in a line with her, as the wind was then blowing. At 12.15', midnight, the watchman awoke the second mate, with the intelligence of the fire, and that coals

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of fire were flying across and falling in all directions about the ship. All hands were immediately called, and stationed in various parts of the vessel; men were sent into the fore, main and mizen tops, with buckets of water.

The foresail soon burst into a flame, and the hose which had been used in wetting the decks, were got into the foretop. In the mean time the third mate, and others who were in the foretop, having exhausted the water in their buckets, attempted to beat out the fire in the foresail, but without success, and, upon getting the hose up, it was found that there was not sufficient force to get the water so high, and they were comparatively useless, and the fire soon drove the men from the top. The mizen topsail and mizen top-gallant sail had then taken fire, and the attention of the crew was directed to extinguish this, and to cutting the sails adrift from the yards; but the wind blew so, that their exertions were all in vain—the dry cotton canvas soon being in a sheet of flame. At this time, Captain McKay, the master, and Captain Ellis, the underwriters' agent, arrived at the wreck. Shortly afterwards, finding that the firemen—who, by this time, had arrived with their engines—would not work on board or near the ship, for fear of the blocks, and other articles on fire aloft, falling on them, it was concluded, for the preservation of the ship and cargo, to cut away the masts. At this time the sails, spars and the rigging at, and the heads of, the lower masts were on fire, although no material damage had been done to the spars by the fire. The forestay and the foretopmast-stay were first cut away, and fell over the starboard rail, into the dock; the foretopmast, in falling, broke short off, and fell down, endways, through three decks, and set fire to the cargo in the lower between-decks, which, however, was not discovered until some time afterwards. The mainmast was next cut away, and, in falling, carried with it the mizen and spanker masts by the deck; the masts, spars, &c., in falling, crushed the boats, rails, &c., on the starboard side, and the houses on deck, broke and otherwise injured the steam-engine, and did much other damage; the houses, &c., on the upper deck, were all, more or less, on fire at the time. After the spars, &c., were cut away, the firemen came on board with their hose, and finally succeeded in putting out the fire on the deck, and it was supposed the ship and cargo were saved; but not until all the houses, com-

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panion-ways on and including the upper deck, rails, &c., abaft the mainmast, were destroyed or very badly burned; the cabin in the upper between-decks, with all its furniture, the stern of the ship, rudder-head, cabin stores, pantry and furniture, ship stores, spare sails, rigging, &c., and a large quantity of bread, which were stowed in the upper between-decks. After the fire on and about the upper deck had been extinguished, and several streams had been removed, to attend to another fire which had broken out in the city, it was discovered that the ship and her cargo were on fire in the lower between-decks, caused by the fore topmast falling down through the decks, (it being on fire at the time,) and thus set the cargo and the ship in the lower between-decks on fire. At the time it was discovered, it had such headway, that all attempts to put it out from above were soon found to be fruitless, and the ship was therefore scuttled in three separate places, and soon sunk down ten feet, when she struck bottom. Every available means were used to extinguish the fire, but without success; and she continued to burn the two following days, when, the ship having burned to the water's edge aft, to about the foremast, they succeeded in putting it out. The cargo was found badly burned in the second and third between-decks; but that in the lower hold was only damaged by water.

Up to the time of cutting the masts away, the cargo had sustained no damage by either fire or water; neither was it damaged by the water thrown in and on the ship, to extinguish the fire on the upper deck and in the upper between-decks, (no cargo having been stowed in the between-decks,) and not until the fire was discovered below, (caused by the foretopmast falling through the decks,) did it sustain any damage by either fire or water. The masts, spars, &c., cut away, were nearly destroyed by fire after they fell on the deck.

After the fire was put out, immediate efforts were made to raise the vessel and save the cargo, which was accomplished under the directions of Captains McKay and Sturges, and the agents of the ship, Messrs. Grinnell, Minturn & Co., by building temporary sides to the ship, when, by means of steam-pumps, she was freed of water and floated.

It was found that the grain in the lower hold had swelled so as to break the knees and beams of the lower deck, and otherwise badly strain and injure the ship.

The cargo was taken out and disposed of by the agents of the ship, except such portions as were delivered to the underwriters in New York, who insured a portion of the cargo.

The ship was found to be so badly injured as to be unworthy of repairs, and was therefore condemned.

The circumstances and facts above set forth are of so complicated a nature, that it has required great care on the part of the adjusters, first, to ascertain the precise facts, and, next, to apply the principles applicable to them; and, after mature reflection, we have come to the following conclusions:—

First. That the masts, spars, sails, rigging, &c., cut away, were so much on fire at the time of the jettison, (every part of them being more or less on fire,) as to be of no value in their then condition, and, consequently, are not subjects of general average contribution.

Second. That, although the articles cut away may be said to be of no value, being on fire, and therefore not subjects of general average contribution, yet the immediate consequences resulting therefrom, whereby property, up to that time in a sound state, was injured and destroyed, are subjects of general average contribution; and we therefore have contributed, in general average, for the damage by fire to the ship and cargo, caused by the foretopmast falling through the decks, and setting fire to the ship and cargo in the lower between-decks.

Third. All the damage by water, thrown into the hold to extinguish the fire, caused by the foretopmast falling through the decks when cut away, is a subject of general average contribution. There is some difference of opinion as to water thrown into a ship to extinguish an accidental fire; but there can be no doubt that the damage by water thrown into a ship, to extinguish a fire caused by a voluntary act, is a loss to be contributed for in general average.

Fourth. That the damage both to vessel and cargo, consequent upon the scuttling, is to be made good in general average contribution.

Fifth. That the damage by fire and water to the upper deck, and the objects thereon, and thereto attached, together with the damage to the cabin, stores, and sides of the ship, provisions, spare sails, rigging, &c., in the upper between-decks, are not subjects of general average contribution.

F. B. Cutting, for plaintiff.

The statement of the general average claim given in evidence by the defendants, is made upon erroneous principles, and greatly to the prejudice of the owners of the cargo.

The fire was communicated to the ship by accident, and the damage occasioned thereby, and by the efforts to extinguish it, by pouring water thereon, tearing away or otherwise removing the burning masts or other portions of the wreck that prevented the firemen from attacking the flames, constituted a particular, and not a general average loss. (*Barnard v. Adams*, 10 How. 303; 3 Kent, 295; 2 Arn. Ins.; Flanders, Maritime Law, § 300, 301, 302; 2 Amer. Lead. Cases, 526, n.)

The masts, spars, sails, and rigging, at the time of being cut away, had been substantially destroyed by the fire; to all practical intents they were then so far consumed as to be no longer of any value as masts, sails, &c.; they were not selected and sacrificed as property exposed to a common peril, for the benefit of the other subjects equally menaced, but were removed as being objects already overtaken by the peril, and so far destroyed thereby as to have been converted into mere instruments of mischief; being impediments in the way of any efforts of the firemen to relieve the ship and cargo, they were lopped off, and an abortive attempt was made to cast the burning remnants into the river.

The adjustment proceeds upon the idea that because, in the attempt to cast the burning masts, &c., into the river, one of the spars accidentally, and unintentionally fell in such direction as to have penetrated the decks, and finally to have communicated the fire to the lower hold, that all the damage to the ship by fire and water, subsequently to the cutting away of the masts, is to be contributed for by the cargo saved in general average. Thus the sound value of the ship is stated at . . . \$275,000
From which is deducted only the value of the

masts, &c., destroyed, viz., . . . \$50,000
And the damage to the upper deck, &c., before
the masts, &c., were cut away, . . . 46,000

96,000

\$179,000

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The value of the ship, therefore, at the time the masts were cut away, whilst still on fire, and burning, is fixed at \$179,000; and the whole of this sum, less only the net proceeds of the sales of the hull, together with the pending freight, is treated as a general average loss.

The adjustment in this respect is oppressive upon the owners of the cargo, inequitable and erroneous.

If it were true that the damage to the ship could be charged in general average, the sum to be made good to her owners ought not to exceed her value in the state of injury and peril she was in at the time of the alleged sacrifice. The adjusters have allowed her full sound value, less only the estimated expense of restoring the masts and the other damage existing at the time they were cut away. (*Nickerson v. Tyson*, 8 Mass. R.; *Fland. Marit. Law*, § 332; 3 *Pardessus*, 217.)

The damage to the ship by fire in the lower between-decks, alleged to have been caused by the foretopmast, ought not to have been allowed as a loss to be contributed for in general average.

The alleged damage was not the direct, or the immediate, or necessary consequence of the cutting away of the masts, even if that act were held to constitute a general average loss. (2 *Arn. Ins.* 890; *Fland.* § 320; 3 *Pardessus*, 215; 2 *Phill. Ins.* 101; 3 *Kent*, 235.)

The peril to the masts, sails, &c., was not increased by cutting them away: on the contrary, to have left them standing, as far as any judgment could be formed, could only have resulted in reducing them to cinders. The only chance of securing the remnants was by casting them into the water, and thereby exposing them to a lesser peril. It is not enough, in order to make a case of general average, that there was a deliberate intent to do an act which might or might not have led to a loss; there must have been a deliberate purpose to sacrifice, or to increase the risk to a part of the adventure exposed to, and not already overtaken by, a common peril, in order to entitle its owner to claim indemnity from the other parties. The masts, sails, &c., cut away, were almost the only part of the ship and cargo beyond the possibility of being saved. (*Fland.* § 309; 11 *Serg. & R.* 61.)

The obligation created by the mercantile law, of contributing to make good a sacrifice of the property of one of the parties in the

adventure, in order to save that of others, presupposes and assumes that the property so sacrificed, or exposed to an increased risk, had an equal chance of being rescued with the other subjects exposed to the common danger, and that, when taken for general benefit, it still possessed substantial value. An equitable right to be indemnified for a loss which had effected the safety of the remainder of the subjects at risk, is thereby created. But, if the thing alleged to have been jettisoned had already been overtaken by the peril, and substantially destroyed, it could in no just sense be regarded as "a sacrifice." (2 Phil. Ins. 1816; *Crockett v. Dodge*, 8 Fairf. R. 190; Fland. sec. 808.)

The masts, sails, &c., when cut away, were no longer in danger of destruction; they had already been destroyed, and reduced to mere wreck. They had become impediments to the firemen; it became necessary to remove the burning remnants, not as matter of election, or of choice between two or more alternatives, but of necessity, in order to defend the workmen against the danger of the blocks and burning masses that were falling from aloft. The act of clearing away the ruins was indeed voluntary and intentional; but every voluntary effort, in an attempt to extinguish a conflagration, by which damage accidentally or unintentionally is caused to other parts of the property exposed, does not give the right to contribution therefor. It is to be regarded as an effort of the firemen in the ordinary course of their endeavors to arrest a fire:—similar to the tearing off of burning rafters or cornices—throwing down a tottering wall—forcing water upon the flames in the hold of a ship, or the openings of a warehouse, or other direct acts of defence against, or attempts to subdue the conflagration. (8 Mass. R. 467; 2 Phil. Ins. 1816; 3 Fairf. R. 190; *Benecke*, 110.)

The alleged sacrifice of the masts, &c., was not successful in effecting the safety of the vessel or cargo. In order to give to it the character of a general average loss, it is necessary to assume that the intention in cutting away the masts, was to rescue the cargo and the ship from the existing peril. So far from averting the danger, its consequences, ultimately, were to carry the fire into the lower between-decks, by which the ship and the cargo were greatly damaged. The vessel continued to burn until they endeavored (but in vain) to subdue the flames by scuttling. The

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fire, nevertheless, continued to rage for two days afterwards, until it had consumed the ship to the water's edge.

The cutting away of the masts, and the abortive attempt to cast them into the river, therefore, produced damage, and not benefit, to the ship and cargo. No claim for contribution to the owners for the value of the masts, sails, &c., could have been maintained by them against the cargo or its owners. (*Scudder v. Bradford*, 14 Pick R 18.)

If the cutting away of the masts, &c., and the attempt to cast them into the river, was not a general average loss, the subsequent damage to the ship by fire, accidentally communicated to the lower hold by the unforeseen direction which the foretopmast took in its descent, ought to be borne by her owners, and should not be assessed upon the cargo. (2 Arn. Ins. 890; Fland. sec. 320.)

The freight, amounting to \$26,855, is charged as a general average loss, and the cargo saved is made to contribute therefor. The adjustment is erroneous in this respect.

The damage by the water injected into the hold of the ship by the firemen, in order to extinguish the fire, was not the subject of general average contribution.

The damage to the vessel, by scuttling, ought not to be contributed for by the cargo. It was not successful in subduing the fire. It resulted in great damage to the grain and cargo in the lower hold. It was an act which diminished the danger to the ship. It was a mere attempt to extinguish the fire, similar in its character to pouring water inside of the ship. But if the damage by scuttling is to be contributed for, the amount is to be limited to the expense of scuttling and of raising the ship, to be ascertained by the adjusters, and to be contributed for by those interests that were benefited by the act.

For these reasons, we contend that the plaintiffs are entitled to judgment upon the verdict.

D. Lord, for defendants, trusted that he would be able to satisfy the court that the adjustment that had been made, was founded on correct principles, and ought not to be altered or disturbed. He rested his argument upon the following points, which he expanded and enforced, and earnestly contended, were fully sustained by the adjudged cases.

First. The cutting away of the masts, and the incidental damages resulting from the fall of the topmast, were proper grounds of general average contribution. The act was done intentionally, with a view to the general safety, and that was actually promoted.

Second. The obligation to contribute is not prevented by the circumstances that the articles cut away, were, at the time, worthless. The whole consequences of the act of sacrifice must be taken together; the incidents, although not contemplated, are part of the sacrifice. In all cases of sacrifice, the property sacrificed is in such danger as fairly to be deemed worthless, except in comparison with other subjects in the same peril.

Third. The damage by the water thrown in to save the cargo on fire in the hold of the ship, and also that by the scuttling of the ship, is a proper subject to be made good by contribution.

These were acts intentionally done for the general benefit, which was actually promoted thereby. (*Bernard v. Adams*, 10 Howard R. 270.) /a

DUER, J., announced the decision of the court, and after stating the facts and the conclusions at which the court had arrived, he observed, that Mr. Justice Hoffman had prepared an opinion, the result of their joint deliberations, in which these conclusions and the reasons upon which they were founded, were very fully stated. There was only a single question, he said, in relation to which he was not prepared, nor inclined, to assent to the views that were contained in the opinion of his brother, which, in all other respects, was to be regarded as that of the court. He was strongly inclined to the opinion, that the loss of the masts and spars that were cut away when they were actually on fire, and their destruction was certain, and their value wholly gone, and when it was only by cutting them away that the fire could be so reached, as to afford a hope that it could be extinguished, and the act was therefore a positive duty, and not a deliberate sacrifice, was a loss, not to be made good by a contribution, but to be borne exclusively by the owners of the ship and their insurers; in other words, was a particular, and not a general, average. He added, that such would probably have been his opinion, even if the cutting away of the masts and spars had been attended with that success in saving the vessel and cargo, which for a short time

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seemed to follow it. Looking at all the facts of the case, he thought it very difficult to say that the cutting away of the masts, &c., created a loss at all; and still more so, that the loss, if any was created, was a fit subject for contribution, within any definition of a general average loss and general average contribution that had been given by any jurist, or adopted by any court. After an attentive consideration of the best authorities, he would venture to give what he deemed to be a true and full definition of the circumstances that give rise to a general average loss and contribution, and would say, that a loss, for which alone a general contribution may be justly claimed, is proved to exist, when it appears, that a deliberate sacrifice was made of the property of one person, with a view to the preservation, from a common and imminent peril, of the property of all engaged in the same adventure; and when it also appears, that the effect of the sacrifice was to save the property of those required to contribute, from the destruction with which it was then threatened. This definition, he was convinced, although he did not think it then necessary to support his opinion by a quotation of the passages on which he relied, corresponded, substantially, with the views of Emerigon, Pothier, and Pardessus, and of Chancellor Kent, Arnould, and Phillips. The Judge then read a translation which he had made of an important passage from "Benecke's System of Marine Insurance," as illustrating very clearly the reasons that had led to the inclination of his own mind, remarking, that in his judgment, the opinions of Benecke, upon all questions in the law of insurance, involving practice as well as theory, from his long personal experience as a merchant and underwriter, in addition to his high qualifications and extensive learning as a jurist, were entitled to more weight and authority than those of any other elementary writer, foreign or domestic.*

The following is the passage that was cited:—

"It is in all cases the duty of the master to exert his utmost diligence, and use all the means within his power, to rescue the ship and cargo entrusted to his care from a peril in which they are actually involved, and if while thus engaged, the sails or masts

* Vide, as to the character of Benecke and his writings, 1 Duer, on Insurance, second Introductory Lecture, pp. 48, 49.

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are broken or destroyed, or the hull of the vessel injured, the damage is not a subject of compensation by a general average, for when the master has only done that which he was certainly bound to do, his acts are not the result of deliberation and choice. The case is still stronger, if the condition of the vessel, from the nature and action of the peril, was such, that without a voluntary destruction of a part, the destruction of the whole was certain and inevitable. Then it cannot be said, that there was any sacrifice of that which had already lost its entire value, and where there is no sacrifice, there is no loss, for which a contribution may be claimed." (*Benecke Sistema delle Assicur.* vol. 4, p. 344.)

After reading this passage, the Judge observed that it was needless to point out the application of the remarks to the case before the court—it was obvious—but it was proper to add, that there was one circumstance by which the case before them was peculiarly distinguished, not only from any reported, but from any supposed by text-writers. The cutting away, so far from being a sacrifice, of the masts and spars, was a measure for their preservation. So far from destroying any value which they then had, it was the only means by which any part of their original value could be restored and saved. It was unnecessary, however, (Mr. Justice Duer further said,) to decide whether the cutting away of the masts and spars was a voluntary sacrifice of property having value, since, if a sacrifice, as it had contributed in no degree to the preservation of vessel and cargo, it was not a subject for compensation by those who had derived no benefit from the act; and in this Mr. Justice Hoffman and himself were entirely agreed.

HOFFMAN, J.—The complaint presents the following case:—That on the 16th of December, 1853, John B. Kitching shipped on board of the vessel called the *Great Republic*, then lying in the port of New York, six hundred tierces of mess beef, of the value of \$15,900, to be carried in and aboard of such ship from the port of New York to Liverpool, there to be delivered. The bills of lading were endorsed to the plaintiffs, and the right of Kitching in the beef transferred to them.

That on the 26th of December, 1853, the ship took fire, and was so badly damaged and burnt, that she was rendered incapable of sailing, and the voyage was abandoned. That the beef was dis-

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charged from the ship, and delivered to the defendants, who, with the assent of all parties, became receivers of the cargo and ship, and of the proceeds of such parts as were proper to be sold, and were to pay over such proceeds to the parties who might be entitled.

That on the 1st of February, 1854, the defendants caused to be sold at public auction five hundred and ninety-five of such six hundred tierces of beef, and about the 18th of February, collected the proceeds thereof, viz.: the sum of \$14,416.87; that they became liable to pay such amount, and were requested to do so, after deducting their reasonable commissions of \$360.42, which they had refused.

The answer of the defendant states:—

That besides the beef of the plaintiffs shipped on board the vessel, there was a large cargo belonging to other persons, to be carried in like manner to Liverpool, according to the tenor of sundry bills of lading, excepting only the danger of the seas and fire. The breaking out of a fire in Front street, and its communication to the ship, is then stated, by which she and her cargo were put in imminent peril of destruction; and to preserve them, it became necessary to cut away the masts, which was done, and in doing which, other portions of the ship, and of the cargo in her, were necessarily greatly injured and damaged.

That by reason of the cutting away of the masts, and of the damage and loss necessarily occasioned thereby to other portions of the ship, and to the cargo, the said tierces of beef and other portions of the cargo laden on board, were saved and preserved; and hence, that the plaintiffs became liable to contribute to the amount of such losses, damages, and expenses, voluntarily incurred as aforesaid, in a general average. That the plaintiffs had agreed, that so much as they might be thus responsible for should be retained out of the proceeds of the sales of the beef. Such sales had been made by the defendants, as general agents of all parties by consent, and amounted to the sum of \$14,056.45, after deducting their commissions; and that the amount for which the defendants were liable, upon such general average, was the sum of \$11,841.70—leaving a net balance due of \$2,214.75, which the defendants offered to pay.

The cause was tried, before the Chief Justice and a jury, in March, 1855. A verdict was taken, by consent, in favor of the

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plaintiffs, for the sum of \$14,056.45, damages, and \$1,500, for interest, "subject to the opinion of the court, at General Term, on the questions of law, arising upon the statement and adjustment of general average, and subject, also, to adjustment of the amount of said verdict by the court, and with liberty, to either party, to turn the case into a bill of exceptions."

Upon the trial, the counsel of the plaintiffs read the pleadings, and rested.

The counsel of the defendant then read a statement, purporting to be an adjustment of the general average, in the case of the ship *Great Republic*. It was agreed, and is so stated in the case, "that the facts, and matters of fact, in the same, are to be taken as testified to, by the master and officers of the ship having knowledge thereof, but no conclusions of law thereon are to be regarded."

By the stipulation of counsel, at the hearing, this is to be considered as leaving the court to draw any conclusion of fact from the statement of the adjusters, as if from depositions of witnesses, whether such conclusions are consistent or inconsistent with those of the adjusters. Probably, this is the legal effect of the agreement stated in the case. Conclusions of law are, of course, left to be drawn by the court.

I think that it will tend to precision in understanding, and correctness in deciding, the case, that the facts be ascertained as they existed at two distinct periods:—one embracing the time between the discovery of the fire, and the time when, in the language of the finding, "the fire on the deck was put out, and it was supposed the ship and cargo were saved;" and the other, from that period until the ship was raised from the bottom, to which she had been sunk, and the cargo was taken out.

I. About midnight, of the 26th of December, 1853, the ship was lying at the foot of Dover street, with nearly all her cargo on board, and her sails bent below the royals. The cargo consisted, chiefly, of wheat, flour, cotton, and rosin. A fire broke out in Front street, nearly in a line with the ship, as the wind was then blowing. The watchman awoke the second mate, with information of the fire, and that coals were falling about the ship. All hands were called, and stationed. Men were sent into the fore, main, and mizzen tops, with buckets.

The foresail soon burst into a flame. Attempts to beat out the

fire failed, and the men stationed in the foretop were driven out of it. The mizzen-topsail, and mizzen-topgallantsail had then taken fire. The crew attempted to extinguish this, and to cut the sails adrift from the yards. These efforts were vain, the dry cotton canvas soon being a sheet of flame. The firemen had, about this time, arrived, with their engines, but would not work on board, or near the ship, for fear of the blocks and other articles, on fire aloft, falling on them. It was then concluded, for the preservation of the ship and cargo, to cut away the masts.

At that time, the sails, spars and rigging at, and the heads of, the lower masts, were on fire. No material damage had been done to the spars by fire.

In executing this determination, the forestay and foretopmast-stay were first cut away, and fell over the starboard-rail into the dock. The foretopmast broke short off, and fell down, endways, through three decks, being on fire at the time, and—as hereafter particularly noticed—set the cargo and lower part of the vessel on fire. The mainmast was next cut away, and, in falling, carried with it the mizzen and spanker masts, by the deck. The masts, spars, &c., in falling, crushed the boats, rails, &c., on the starboard side, and the houses on deck, broke the steam-engine, and did other damage. The houses, &c., on the upper deck, were all, more or less, on fire at the time.

After the masts, spars, &c., were cut away, the firemen came on board, with their hose, and finally succeeded in putting out the fire on deck, and it was supposed that the ship and cargo were saved; but all the houses, companion-ways on, and the upper deck, rails, &c., abaft the mainmast, were badly burned. The cabin in the upper between-decks, with all its furniture, the stem of the ship, rudder-heads, stores, spare sails, and a quantity of bread, in the upper between-decks, also perished.

It is also found, that the masts, spars, &c., cut away, were nearly destroyed, by fire, after they fell, on deck.

The fire, on and about the upper deck, being extinguished, several streams, of the engines, were removed to another fire, which had broken out in the city. After this, it was discovered that the cargo was on fire, in the lower between-decks, caused by the foretopmast falling through the decks, being on fire at the time. The subsequent measures were then taken, as hereafter noticed.

1. The first question is this: Suppose the expectations entertained at this period, when some of the engines were carried off, had been realized, and the disaster arrested, would there not have been a case made, as to many items, for a general average? The forestay, the foretopmast-stay, the mainmast, the mizzen and spanker masts, were voluntarily cut away; the heads only of the masts were on fire; they were destroyed after they fell, on deck: so the spars had received no material damage, and were burnt on deck. The boats, sails, &c., the steam-engine, and houses on deck, were injured directly by the cutting away of the masts. The evidence shows that these articles were, at the moment of the act of destruction, of an appreciable and considerable value. Had they fallen into the dock, and been reclaimed, they would certainly have yielded a considerable sum to the owners.

The general rule is, that the cutting away of masts, sails, boats, &c., is an ordinary subject of contribution. It is true, "that nothing but the presence of imminent danger will entitle the owner to make such a claim; and the sacrifice must, at least, be the apparent cause of extricating the ship from her perilous situation." (Stevens on Average, p. 66; *Bickley v. Pesgrave*, 1 East. 220; Abbot on Shipping, p. 334, citing *Marsham v. Dutry*; Select Cases of Evidence, p. 58; Arnold's Marine Insurance, § 327.)

But there is much authority to show, that the demand for contribution is not limited to cases where the voluntary act both commences and completes the destruction of the subject for which it is claimed. It extends to cases where accidental peril has begun, and the voluntary act has consummated, that destruction.

A distinguished French writer, M. Pardessus, discusses this subject, in a series of remarks of much pertinence to the present case. He states the two general rules: first, that when, by an ordinary peril of the sea, a mast is broken, a boat detached, or a leak disclosed, such accidents are matter of simple average, to be borne by the owner of the ship, and not subjects for contribution; and next, that if, during a storm, or a combat, it is found necessary, for the purpose of relieving the ship, or facilitating a manœuvre, to cut away a mast, or make any other sacrifice, that must be considered as a case of common average.

He then proceeds: "that, in combining these two rules, it results, that if a blast of wind had broken the mast, and then, for the safety

of the ship, it was necessary to complete the fracture, and cast it, with sails and rigging, into the sea, that last measure will form a case for common contribution, and the amount will be determined, according to the value of the mast and appendages, at the time of the breaking produced by the accident. Before the determination to make the sacrifice, it was but a case of simple average." (Art. 737, 738, Pardessus' Droit Commercial, vol. 3.)

Emerigon states the same rule: "It is particular average, if the mast is carried away by the force of the wind, without the concurrence of man. But if, the wind having broken the mast, the fracture is obliged to be finished, and the mast thrown into the sea, with sails and rigging, it is then a general average, for the value of the mast and accessories, in the state the whole was in when broken." (Meredith's Translation, p. 480.)

The case of the *Red Lion*, mentioned by Magens, (vol. 1, 181,) carries this doctrine as far as it, perhaps, will bear. It was an average, settled at Hamburg. In a storm, the bowsprit, with the lower yard and sail, were broken to pieces, and carried overboard. By the rolling of the ship, the foremast, with the foretopmast, topgallant-mast-stay, shrouds, main-stay, main-topgallant-mast, with the whole set of sails, went overboard. They were all immediately cut away, to get quit of them, lest, by their working, the ship should go to the bottom. They cut, also, a maintop-stay in pieces, to cover and preserve the cables. They found it necessary to return to the Elbe, where, after some other disasters, they arrived. The ship was unloaded and repaired.

The *Dispacheur* adjusted the general average of these losses, in a manner which Magens approves. All the above items were brought into general average, except the maintop-stay.

The propositions, thus stated, are, indeed, to a considerable extent, contested, by both Mr. Stevens and Mr. Benecke, (pp. 67 and 111.) The latter admits of an exception, when the accident occurs in sight of port, which the vessel might have reached without cutting the rigging, and the measure is adopted to facilitate the manœuvring, and give a better chance of preservation. The rigging cut away ought then to be allowed for. There would then be a sacrifice.

Mr. Phillips does not concur in the views of these writers. Mr. Arnould states the rules in accordance with the foreign authorities,

(vol. 2, p. 894,) and in the case of *Nickerson v. Tyson*, (8 Mass. Rep. 467,) is in point, with the qualification, that the value to be paid for is only that of the masts and spars, after they were cast overboard, and were hanging by the sides of the vessel.

But now arises a point, the subject of no little discussion and difficulty. The masts and spars, it is insisted, must have been destroyed; for them there was no possibility of safety. When cut away, they were, indeed, of a considerable value; but that is not enough—the thing destroyed must have been in such a position as that there was a possibility of saving it, as well as of saving that for whose safety it was given up. What is certain of being destroyed, cannot be treated as of any value—cannot, therefore, be allowed for. It may be conceded that the masts, &c., were of value when cut away: that is, had a sudden flood of rain extinguished the fire, they would have been of value; but, as exposed, and under the actual circumstances, they were of no value. Their positive value only arose from their being cut away, and existed as to such only as fell overboard.

So distinguished a writer as Mr. Benecke gives this view the sanction of his authority. He says:—"If the master's situation was such, that, but for a voluntary destruction of a part of the vessel or her furniture, the whole would certainly and unavoidably be lost, he cannot claim contribution; because a thing cannot be said to have been sacrificed which had already ceased to have any value." (P. 283, London ed.)

In commenting upon this subject, Mr. Phillips makes the following remarks, (vol. 2, p. 66, ed. 1853.) "The correctness of this position admits of great doubt. It is inconsistent with cases of undisputed claim for contribution, as, for instance, composition with pirates. The more imminent the peril is, the less questionable seems to be the claim for contribution on account of a sacrifice made to avoid it." "If, indeed, the thing abandoned is itself so exposed to destruction that it cannot possibly be retrieved and saved, and its abandonment cannot possibly contribute to the safety of the ship or crew, cargo or freight, there may be ground of objection to contribution. But in cases of such objection, the construction will be very liberal in favor of contribution."

In the *Columbian Insurance Co. v. Ashly*, (13 Peters, 381,) the special verdict found, "that the captain in this situation, finding

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no possible means of saving the vessel or cargo, and preserving the crew, slipped his cables and ran the vessel ashore." The ship was allowed for.

So in *Bernard v. Adams*, (10 Howard, 278,) the captain thought it impossible to get by a point without being wrecked and lost; he, therefore, directed the course of the vessel towards the shore. The ship was not utterly broken up; but it would cost more to get her off than she was worth. She was, therefore, sold.

Justice Grier presents the charge of the Judge as if thus made: "That if the jury believed, that there was imminent peril of being driven on a rocky and dangerous coast, where the vessel would have been inevitably wrecked, with loss of ship, cargo, and crew, and that the immediate peril was avoided by stranding her at a less dangerous place, it was a case for contribution." The learned Judge enters into a minute criticism of the phrase inevitable, and other expressions.

He states the proposition of the plaintiffs' counsel thus:—"If the common peril was of such a nature that the thing cast away to save the rest would have perished any how, even if not selected to suffer in place of the whole, there can be no contribution." He then proceeds:—"If this be the meaning, and we can discover no other, it is a denial of the whole doctrine upon which the claim for general average has its foundation."

We cannot but observe that it is contrary to truth of reasoning, as well as to philology, to say, that a peril is inevitable in reference to the whole subject exposed to it, when the event shows that a portion of that subject escaped. The good sense, and the result of the two cases in the Supreme Court of the United States, seems to me this:—

A state of things may exist, and in those cases did exist, in which a certain and common destruction appeared inevitable, if nothing was done. But if an act was done, and it resulted in evading the peril as to part of the subjects exposed, but another part was lost in the act, the latter shall be allowed for; and this, although the peril incurred as to that part was just as sure of leading to its destruction, as the peril to which it was originally exposed.

Let the case of the *Hope*, and that of the *Brutus*, be tested by the rule advocated by Mr. Benecke. The vessel was, according

to the best judgment that existed in the case, certain of being utterly lost. She was then, at the moment of the act determined upon, of no value. But the act of stranding her in another place, while it brought no greater or other peril to herself, was the means of saving the cargo; and, for that preservation, the cargo contributed to meet her loss.

This reasoning derived from these decisions, seems to me irresistible, upon the hypothesis of success now presented. The masts and spars were cut away to enable the firemen to come on board, and to use the most, if not the only effectual measures, to avert the danger. They succeeded in extinguishing the fire, so that entire success was apparently the consequence of the act. The masts and spars were of considerable value at the moment of their premeditated destruction, as well as the ship *Hope* at the moment before her stranding. Every element in Mr. Justice Grier's propositions, as to what makes a case of general average, is included here. There was a common danger, in which all participated—a danger, apparently, inevitable to all, if no act of man averted it. There was a transfer of this imminent peril, from the whole to a portion of the whole. The act was eminently calculated to preserve the residue of what was exposed, and seemed, for a time, to have done so.

I apprehend then, that although a fortuitous cause has begun the work of destruction of part of a ship—if a voluntary act completes it, and that act averts or diminishes the damage to the cargo and rest of the ship, there is ground for contribution; and that this rule is equally applicable, whether it is certain that the fortuitous cause would have destroyed that portion if left alone, or not.

My own examination has thus led to the conclusion, that in the present case the damage to the masts, spars, railing, and some other articles, would have proved a case for general average, had the result of cutting them away been finally successful. But my associate, Mr. Justice Duer, is much inclined to a different view of the point; and I may well distrust my own conclusions, when they do not meet the approval of one who has made commercial law the subject of such extended and profound examination. Still, the propositions of the adjusters, and the points argued by coun-

sel, have made it proper to discuss and express my opinion upon the subject.

It happily does not become essential to decide this question, in consequence of the conclusions we have arrived at upon another point, which I now proceed to state.

2. I have before noticed the rapid progress of the flames, and the unavailing efforts of the crew to arrest them—the arrival of the engines, and the circumstances which, for a short period, rendered their arrival useless. The blocks and other articles, which were falling from aloft upon the deck, menaced the firemen with a need-less peril, and they refused to board the ship, unless the masts were cut away. The moment this was done, their labors were bestowed, and were effectual. The whole peril appeared, for an interval, subdued and averted—success seemed to have rewarded the efforts of those engaged, and preservation to have been won when the sacrifice was consummated.

But these hopes and expectations were illusory. The interval of apparent security was the period of the most imminent and fearful peril. All the measures adopted for safety proved sources of destruction. The triumph of energy and skill was momentary, and even for that moment delusive.

Sed non idcirco flammæ atque incendia vires
Indomitas posuere; udo sub robore vivit
Stupa, vomens tardum fumum; lentusque carinam
Est vapor.

II. This unfortunate result brings us to the consideration of the facts attending the second period of the accident; and it is necessary to understand these facts and circumstances, with regard to two points of the case.

First. Whether they displace the apparent right to a contribution for the masts, &c., cut away, assuming such a right to have existed.

Next, (and of far more importance,) Whether they give a foundation to the claim for contribution for nearly two-thirds of the original value of the ship, and for about one half of the cargo, as well as for the freight.

And this last question is to be examined, also, in connection with all the facts from the commencement to the end of the disaster.

It is found, that after the fire on and about the upper deck had been extinguished, and several engines had been removed to attend a fire in another part of the city, it was discovered, that the ship and her cargo were on fire in the lower between-decks, caused by the foretopmast falling down through the decks, (it being on fire at the time,) and thus setting the cargo and the ship in the lower between-decks on fire. When discovered, the fire had such headway that all attempts to extinguish it from above were soon found to be fruitless; and the ship was, therefore, scuttled in three separate places, and soon sunk down ten feet, when she struck the bottom. Every effort to put out the fire was ineffectual, and the ship burned for two days, when, being burned to the water's edge from aft to about the foremast, it was extinguished. The cargo was burned badly in the second and third between-decks; but that in the lower hold was only damaged by water.

Up to the time of cutting the masts away, the cargo had sustained no damage by either fire or water; nor was it damaged by the water thrown in, or on the ship, to extinguish the flames on the upper and in the upper between-decks; and not until the fire was discovered below, caused by the falling of the foretopmast through the decks, did it sustain any damage, by either fire or water.

The grain in the lower hold had swelled so as to break the knees and beams of the lower deck, and otherwise badly strain and injure the ship.

The vessel was afterwards floated—the cargo taken out, and the ship condemned and sold.

1. The first question is as to the effect of these events upon the right to contribution for the masts, &c., cut away, supposing it to have been otherwise due.

I consider the true rule to be, that the achievement of the object designed, even for a very short period of time, will be sufficient to justify contribution notwithstanding a subsequent loss, provided the ultimate loss results from a new peril.

Emerigon states the case of a jettison saving the vessel, which is then wrecked in another place. Yet for the time, she had been saved by means of the jettison, and what is ultimately preserved should make it good. (Emerigon, 476, Meredith's edition.)

Valin, however, observes, that if the effect is only to comfort

the ship—if the storm recommences, though after some hours of interruption or diminution, and the vessel is lost, though several days after the jettison, there is no contribution, (cited *ibid.*) If the jettison and shipwreck (says Pothier) are caused by the same tempest, the effects saved shall not contribute to those thrown into the sea. (Pothier, No. 114.) M. Rogron, in his *Code Francais Expliqué*, (Paris, 1855,) in his comment upon article 423 of the Code of Commerce, lays down the same rule.

Pardessus presents, as the rule of the French Law, this proposition:—"That if once the danger for which the sacrifice had been made is avoided—for example, that the tempest is ended, or the ship has escaped from the enemy, even if it is for a slight interval—contribution is due. The important point is, not to confound the continuation of the same accident, though after an interval, with a new accident. If the things saved meet, afterwards, with new injuries, those subsequent events, independent of the first, (though they may be extremely close to them,) do not prevent that the things which escaped, more or less injured by the new accident, and come to port, should pay the first debt. The goods, thus subsequently damaged, contribute according to their real value at the time and place when contribution is adjusted. If they have perished in the voyage, though in consequence of a subsequent event, the owners are not held liable." (Art. 743.)

19 The case of *Walker v. The United States Insurance Company*, (11 Serg. & Rawle, 61,) and the case of *Lewis v. Williams*, in this court, (1 Hall's Rep. 440,) sustain the principles thus advocated. The reasoning of Chief Justice Jones, and of Mr. Justice Oakley, is clear and decisive upon the point. And the case of *Scudder v. Bradford*, (14 Mass. Rep. 18,) appears to me perfectly consistent with these authorities and decisions.

Thus the question is, was the peril which rendered the sacrifice useless, a continuation of the same peril which led to it, or was it a new disaster? The fire, which induced the act of destruction, was transferred, with the blazing spar, from above to the hold below, and there continued and spread itself. It seems difficult to say that this was different from the continuation of the same tempest, which, by rendering the sacrifice fruitless, displaces a claim to contribution; and it follows, that no claim exists in the present

case for that damage which, though caused by a voluntary act, did not, in reality, avert or diminish the peril.

2. I come next to the consideration of that important part of the cause which relates to the almost total destruction of the vessel, and of about half the cargo, for which contribution is sought.

The general features of this interesting part of the case are these:—That the original or primary cause of the loss was an accident not the subject of general average: that a proximate cause of the preservation of the hull and cargo was the scuttling of the ship; that the immediate cause of the scuttling was a fire in the hold and between the lower decks of the vessel; that such fire was brought there by a voluntary act of destruction; and that such voluntary act, instead of averting the peril it was intended to prevent, was an actual and efficient agent of the loss that ensued. The primary and accidental cause of the disaster was transferred from one part of the ship to another. It became a continuation of that original cause; a transmission of it, in its full and uninterrupted character, to the vessel and cargo.

Had no measures been taken to arrest the flames, the vessel and cargo would have been destroyed. Had the scuttling not taken place, the same identical results would have ensued; and ensued not merely in spite of the voluntary act, but as its direct and immediate consequence. Had the vessel been left unscuttled, a heavy gale of wind, and dash of the wave might have preserved some portions of her hull and of the cargo. Would it have been possible to sustain a claim for contribution under such circumstances?

There are cases where contribution has been compelled for sacrifices honestly made, although a severe inquiry might have left it questionable whether they were essential to the preservation which ensued. But to award contribution for a voluntary act which directly led to the destruction, or which, at least, did not for a moment interrupt the progress of the original cause of the disaster—and when that cause was fortuitous—seems unsanctioned by principle or authority.

The essential constituents of a case of contribution are, that the intelligence, the will, and the act of man, have intended and produced the sacrifice of the thing for which compensation is sought,

and have worked, in whole or in part, the preservation of the property from which it is claimed. The subjects destroyed must have been, in the contemplation of the party, as things to be destroyed. This rule admits, indeed, of a few guarded exceptions, but none which may not be considered, in the ordinary course of events, as comprehended within the intention. The cutting away of masts is probably as often accompanied with damage to boats and railings as otherwise, and may well be assumed to have been an expected consequence. The leak, as in the case of *Magrath v. Church*, (1 Caines' Reports, 214,) may reasonably be anticipated as a probable result of the splintering of masts when cut away.

With such exceptions, I apprehend the pervading principle of contribution is such as I have stated. There must be the intent to sacrifice the thing designated. The sacrifice must be accomplished. Some definite advantage must have sprung from it. A final preservation must ensue, not indeed by a logical necessity directly and solely from the sacrifice, but as reasonably contributed to by it, or as consistent with it, as with any hypothesis the circumstances will allow.

It appears to me that this principle will be found more discernible than any other, in all the great leading authorities in which a claim for general average has been sustained.

The important and contested cases of stranding, even accompanied with a total loss, rest upon this proposition. Take the case of *The Hope*, in the Supreme Court of the United States, (13 Peters, 331.) The vessel was surrounded with dangers. She had begun to strike upon the shoals, and her head swinging round, she was brought broadside to the sea. The captain slipped his cables, and ran her ashore, where she was totally lost. That act was designed to peril the ship, and did in fact wreck her. A definite advantage in changing the location resulted. The preservation of the cargo might reasonably be attributed to it. It is too speculative to say that the ship must have been lost elsewhere, or that the cargo might possibly have been saved elsewhere. An act was done with the certainty of its entailing a loss to the vessel, which may have been less than total, but which was apparently inevitable; and it did tend to save the cargo. It was done as an act hazardous to both, but to avoid a more certain and greater

peril. *Bernard v. Adams*, (10 Howard, 373,) is strongly to the same effect.

We may trace the same principle in the cases upon the question whether the cost of the repairs of a vessel, and the expenses of her delay, upon a deviation into a port of necessity, are to be allowed as general average or not. On this subject M. Pardessus concludes that all the expenses attending the delay, (*reldche*), such as wages and provisions, are items of this description; but not the cost of the repairs of the vessel, occasioned by the marine disaster. As to these, the deliberation which has decided the intention, does not change the character of the previous accident. (Art. 741, vol. 3, p. 228.)

On the contrary, another late French author, in a very elaborate discussion, after critically weighing the language of the 400th and 403d articles of the Code of Commerce, decides, that all the expenses attendant upon such a deviation and delay should be classed among simple averages. (Lemonnier *Assurance Maritime*, vol. 2, p. 107, 113; Paris, 1848.)

M. Emerigon defends the position of Pardessus. Boulay Paty, his editor, that of Lemonnier. (Ib. p. 113, note 5.)

But the French authorities observe a distinction. If the tempest has compelled the cutting away of masts, or such dismantling of the vessel as to render the prosecution of her voyage impossible or difficult, the resort to the port of refuge is a consequence of the voluntary act, and shall be attended with similar results. The expenses and repairs are subjects of general average.

With this distinction, the English courts have adopted the more rigorous and more logical rule advocated by M. Lemonnier. *Power v. Whitmore*, (4 Maule & Selwyn, 141,) appears to have thus settled the law, and so it is considered by Mr. Arnould in his judicious observations upon that and the case of *Plummer v. Wildman*, (2 Arnould, 298.)

A different rule prevails in our own state, and in many of the other states. The cases are referred to in 2 Phillips on Insurance, 120, &c.; to which may be added *Potter v. The Ocean Ins. Co.*, (3 Sumner, 77.) The wages, provisions, and expenses in a port of necessity, constitute a claim for general average. And this rule is established without reference to whether the original cause of the resort to the port of necessity was one of a fortuitous charac-

ter, or from a voluntary act of sacrifice. But as a general rule, the repairs of the vessel are not allowed.

The determination—the forced volition, which compels the captain to resort to the port, is a determination to incur the loss of the provisions, the extra wages, and incidental expenses; and it is as much a species of sacrifice as the destruction of a mast. It is intentionally incurred. The expenses and losses are such as must enter into the contemplation of the party. They are the natural, the inevitable fruits of the decision.

And thus we see that in whatever form the rule is found—whether in the rigorous sense of Lemonnier and of the English courts, or in the more expanded one of our own decisions—the principle adverted to may be traced in its full influence. There is what is equivalent to a premeditated sacrifice of the distinct subjects—the fulfilment of the intent, and a consequent benefit to what is called upon for compensation.

The cases of ransom from pirates, whether by giving up portions of the cargo, or by bills, furnish the same rules. Not only the price paid, but the wages of the hostage, are intentionally incurred, definitely contemplated, and plainly resulting in the common good. (Emerigon, *ibid.* 377, and the case of the *Vierge de Cadera*, *ibid.* 377.)

So the expenses and wages incurred after capture and a successful attempt to reclaim the property, have the same characteristics. (Arnould, p. 2,912. *Leavenworth v. Delafield*, 1 Caines, 573.)

If such is the ruling principle to be found in the law upon this subject, the present case, in the view now considered, cannot admit of doubt. The destruction contemplated was of the masts and spars, and the ordinary consequential damage. The vessel and each part of the cargo was meant to be saved, not sacrificed. What was designedly given up was uselessly surrendered, and what it was meant to preserve was destroyed by the very act of sacrifice.

We are brought, then, to the consideration of the next material act of the agency of man in this catastrophe, viz., the effect of the scuttling. It will be remembered that the ship, when scuttled, sank down ten feet, when she struck the bottom.

What, then, was the effect of the scuttling? Let it be conceded that all that was preserved of cargo or vessel was saved by this

act. Let the utmost force be yielded to the argument of counsel, that, as the vessel was lightened by the progress of the fire, she would gradually have risen, to meet, as it were, the fatal embrace of the flames. She would then have burnt lower, and, for a considerable part of the ten feet, which, by the scuttling, was submerged. And thus, the ten feet of frame, and the principal portion of the cargo rescued, owed their safety to this deed.

Still the important and decisive question remains:—What part of the ship was destroyed by the scuttling? It is indispensable, in conformity with the principles before stated, that such destruction should be directly traced to the scuttling, and an appreciation of it, be possible.

The flames continued for two days, and burnt the vessel to the water's edge, from aft to near the foremast; and no part of the damage can, upon the finding, be attributed to the scuttling, except the breaking of the knees and beams of the lower deck, and the strain and injury arising from the swelling of the grain in the lower hold.

And as to the cargo, that in the lower hold was only damaged by the water. All the rest was chiefly, if not solely, injured by the fire.

The question appears to be reduced to this,—Shall the amount of injury to the ship, and damage to the cargo, which can be definitely traced to the scuttling, be brought into general average?

We have been referred to *Crockett v. Dodge*, (3 Fairfield's Reports, 190,) as bearing upon this part of the case. It has been much criticized; and the language of Justice Story, in 13 Peters, 331, is quoted as decidedly contradictory to it. But in that case, the owners of a cargo of lime asked contribution from the owners of the vessel. The cargo was on fire from spontaneous combustion. The vessel was, after first resorting to some other measures, hauled from the wharf, and scuttled; by which the lime became of no value, and the vessel was preserved. It was held that contribution could not be allowed, if there was no possibility of saving the lime when the act of scuttling took place.

We apprehend that this decision may be best placed upon a settled rule of law, that no contribution can be claimed for a loss of cargo which is damaged by its own proper vice.

Mr. Benecke, (Benecke & Stevens, p. 13, Boston edition, 1853,)

says—an injury ascribable to the quality of the goods ought never to prejudice the rest of the shippers, or the ship-owners.

In the *Dictionnaire De Droit Commercial*, of Grousset & Meiger, (Paris, 1852, vol. 1, p. 53,) it is stated, that if the loss results from the proper vice of the article, the owner must bear the consequences. Delaborde, p. 40, is cited for the proposition. Roccus states the same rule. (Ingersoll's Translation, 83.) And Boulay Paty, in his edition of Emerigon, (Paris, 1827,) declares, also, that a loss arising from the proper vice of the cargo is matter of simple average, (§ 438,) and the same rule is fully established in the English law and in our own, (2 Arnould, 758, § 282; 1 Phillips, 627.)

The two articles of the Code of Commerce seem explicit to this point. The like rule was applied in the case of *Bond v. The Su-perb*, (Wallace, Jr., Rep. 355.)

But the present case is different. The fire was fortuitous. We may treat it precisely as if it had originated by accident in the between-decks. The scuttling necessarily brought a direct and immediate damage to the cargo in the lower hold—the grain, it is presumed. It brought it intentionally. It was certainly to be anticipated that a damage to that article of the cargo would result. It preserved, in a damaged state, a part of that article, and it preserved whatever of the residue of the cargo was saved, and that relic of the vessel which was raised.

Mr. Benecke, (page 165,) says:—"If sacrifices be made, in order to extinguish the fire, (occasioned by lightning, intrinsic quality, or other accidental causes)—if masts, or cables, for example, be cut away, or the vessel be run ashore—I am of opinion that the damage ought to be general average, although an instance of a decision to the contrary is quoted by Emerigon."

He proceeds:—"If water be thrown down the hatches to stop the progress of an accidental fire in the hold, or between decks, this must be conceived to be done with the double intention, of saving the articles which have already caught fire, from utter destruction, and of extricating the vessel and rest of the cargo from an imminent danger. The effect of the water upon the former goods is, therefore, particular average. It is not an injury, but a real advantage to them. But the damage done by the water is, I conceive, of the nature of a general average."

He quotes the Ordinance of Bilboa, that when a vessel catches fire in the harbor, and an adjoining vessel is sunk, in order to save the others, the damage must be made good by the contribution from all the other ships and cargoes.

It appears to us that the direct damage done to the cargo in the lower hold, by the scuttling, is a proper subject for contribution. We presume it can be arrived at, by a comparison of the invoices of the grain there stowed, and the proceeds of the sale of such grain.

No damage to the articles of the cargo which were between decks, and on fire, arising from the water thrown in, is to be contributed for. The fire is to be considered as still an accidental fire.

And we think that the damage to the knees and timbers, resulting from the swelling of the grain in the lower hold, which directly sprung from the scuttling, is to be allowed. What would it have cost to repair that specific injury? This, we suppose, the adjusters can, without difficulty, ascertain, and with reasonable precision.

III. It is next necessary to state what rules of valuation are applicable to the subjects which are to be allowed for, and those which are to contribute.

1. The amount to be allowed for the ship, is that sum which the adjusters shall be able to say arose, definitely, from the injury to the knees and beams of the lower deck, and the strain to the ship, produced by the swelling of the grain in the lower hold.

The ship is to contribute upon the proceeds of the sales of her hull and materials, to which is to be added that amount which the adjusters shall ascertain ought to be allowed for injury to the knees, &c., as above stated. (*Dodge v. The United Insurance Co.*, 17 Mass., 475; 2 Phillips on Ins. 137, 4 edition; Pardessus, art. 748.)

2. The damage to the cargo to be allowed for, is to be ascertained by a comparison of the proceeds of the sales with the invoice cost.

The ordinary rule, in a case of jettison, is to take the value at the port of destination, and to allow that value, as well as to fix the amount of contribution upon the same basis for what is saved. (2 Phillips, 4 ed. p. 132.) Where sales of damaged goods have been made, the difference between the sales and the valuation, if

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sound, is the amount to be allowed. (Magens' case xxv. vol. 1, p. 293.) If goods are sold at the place to which the apportionment relates, the amount of the proceeds is the basis on which their contributory value is fixed, (2 Phillips, 151, ed. 1854,) and goods are contributed for at the same rate, and on the same basis as goods contribute. (Ibid. p. 132.)

In a case like the present, where the voyage has not commenced, and the goods were recently shipped, their value may properly be tested by the invoices; and the sales of the goods, at the same port of shipment, may be taken as evidence of their value after the disaster. The difference is the damage to be allowed. The difference between the invoice and the sales is \$45,409.38. This is to be contributed.

3. The next question is, On what basis is the residue of the cargo to contribute? The ordinary rule is, that, in cases of jettison, the cargo is to contribute upon the value of the goods, estimated at their prime cost or original value; or, if the vessel has arrived at her port of destination, at their value at such port. (*Rogers v. The Mechanics' Insurance Co.*, 2 Story's Rep. 173.)

Mr. Abbott states, (347,) that if the ship, in consequence of any misfortune to be sustained by general average, be compelled to return to its loading port, and the average be immediately adjusted, in that case, the goods only contribute according to the invoice prices, for the price of sale is unknown.

In the *Mutual Insurance Co. v. The Cargo of the George*, (8 Law. Rep. 361,) the ship was stranded, and unable to return to the port of departure, or to adopt an intermediate port. The vessel was lost, and a greater part of the cargo saved.

The cargo was adjudged to contribute, at the prices stated in the invoices and bills of lading, deducting therefrom salvage, and other necessary expenses, incurred in consequence of the wreck.

But, in these instances, the value of the cargo, as preserved, was to be arrived at; it being a fixed rule, that a subject is to pay according to its value, as it exists, when called on to contribute. But, in the present case, all the cargo was, to some extent, injured. All that was preserved was sold. The prices may be taken as a fair test of the value of what was saved.

We may add, that in the present case, the consent of all the parties interested, to a sale of all the cargo, renders this mode of

adjusting the basis of contribution proper, even if another would, in ordinary cases, be more regular.

4th. In this connection, another question arises. It is a general rule, that the goods, or articles, sacrificed and allowed for, are made to contribute in common with those saved.

If merchandise is thrown overboard, worth \$1,000, and the residue of the cargo, and the vessel, are valued at \$10,000, it is plain that, if the owners of the latter pay the whole \$1,000, the owner of the goods jettisoned loses nothing. It is, however, a fundamental principle, that he is to be dealt with precisely as if the goods of another had been sacrificed. Hence, he pays with the others; and the contributory interests, in the case stated, are \$11,000, instead of \$10,000, or 9.09 per cent., instead of 10 per cent.

In the present instance, on the assumption that only the grain in the lower hold was damaged by the scuttling, and therefore the subject of a general average, the loss was \$45,409.38.

The owners of this grain pay, of course, their proportionate amount of the proceeds of the sales of what was saved. But if they pay nothing upon the amount contributed to them, they would receive from others the whole \$45,409—in other words, would get the whole value of the goods thus lost to them. They should pay the same percentage on what they get, as the owners of the other portions of the cargo pay upon what they receive.

We, therefore, add to the value of the cargo which is to contribute, the amount of the loss which is to be paid to the owners of that part of the cargo allowed for.

5th. The next question is, whether the freight should be contributed for. The voyage was broken up: the voyage cannot be said, indeed, to have commenced. The contracts of the affreightment were at an end. Not a dollar of freight had been earned. How can it be treated as sacrificed? The ship is not allowed for. Its accessory, the freight, cannot be.

It is true, there was a total loss of the ship, which occasioned the breaking up of the voyage, and a consequent loss of the freight; but the total loss of the ship was a particular, not a general average. It was produced by the fire, not by the scuttling, to which alone the general average, as its proximate cause, is attributed. Had the ship sustained no injury but from the scuttling, as she might have been repaired at a moderate expense, the voyage, we are

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bound to believe, would have been resumed, and the freight earned.

When freight was allowed in the *Columbian Insurance Co. v. Ashley*, (13 Peters, 364,) it was because the ship was allowed for. It was lost, as well as the ship, by the sacrifice for the common good. And when freight *pro rata itineris* (that is, the freight which had been earned at the time of the disaster) was allowed in *Gray v. Walker*, (2 Serg. & Rawle, 229,) the ship was also a subject of general average.

To allow freight in this case would be, in effect, to make contributors in general average insurers of the freight.

It follows, that if freight is not to be allowed for, it is not to contribute.

6th. There is a large amount of expenses carried into general average, which might require some apportionment, upon the principles of this decision. We have supposed, from the course of the argument, that we were not called upon to enter upon this point. But if we were mistaken, it is, of course, open for consideration.

The result is, that the adjustment must be revised upon the principles stated. An order referring the case to the adjusters, as referees, may be entered, to be settled by one of the Judges.

CAMPBELL, J., concurred in the decision, but declined to express an opinion upon the question upon which his brethren differed.

The following schedule, prepared by Justice Hoffman, may be useful to show the application of the rules stated, upon hypothetical amounts:—

No. 1.

RECAPITULATION OF PREVIOUS STATEMENTS IN DETAIL.

<i>Invoices.</i>		<i>Losses.</i>	
Corn and wheat,	\$68,943 92	Corn and wheat,	\$45,409 38
Beef,	22,442 20	Beef,	2,770 08
Lard,	4,250 50	Lard,	522 20
Tobacco,	2,210 00	Tobacco,	1,763 94
Argals,	1,877 49	Argals,	572 23
India-rubber, . . .	375 00	India-rubber, . . .	375 00
Rosin,	11,441 89	Rosin,	5,644 52
Tea,	1,800 00	Tea,	1,570 21
Timber,	1,707 25	Timber,	1,272 78

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Casks ore, \$1,500 00	Casks ore, 100 00
Flour, 49,330 28	Flour, 9,163 85
Cotton, 48,721 26	Cotton, 32,208 11
<u>\$214,669 79</u>	<u>\$101,372 30</u>
Sales of the above,	113,287 49
	<u>\$214,659 79</u>

No. 2.

To be contributed for.

Loss on cargo by scuttling, (corn and wheat,) . . .	\$45,409 38
Damage to vessel by scuttling, say, hypothetically, .	5,000 00
Expenses of general average, by Grinnell & Minturn, as stated in settlement,	29,957 75
Johnson & Higgins, expenses of adjustment, . . .	1,835 00
<u>Amount to be contributed,</u>	<u>\$82,102 13</u>

No. 3.

Subjects to contribute.

Vessel—Hypothetical damage, as above, \$ 5,000 00	
Materials sold,	2,468 90
Hull, &c., sold,	28,078 38
	<u>\$35,547 28</u>
Cargo, on amount of sales, \$113,287 49	
Loss on the grain, &c., to be contributed for, per Statement No. 1, 45,409 38	
	<u>158,696 87</u>
	<u>\$194,244 15</u>

\$194,244.15, \$82,102.13—say $42\frac{1}{4}$ per cent.

Beef in question,	\$14,416 87
$42\frac{1}{4}$ per cent,	6,093 13
	<u>\$8,323 74</u>
Balance,	
On Kitchings' wheat,	4,968 00
$42\frac{1}{4}$ per cent,	2,101 48
	<u>\$2,866 52</u>

NOTE.—The case was settled, by the parties, upon a readjustment made under the rules declared by the court.

WM. B. FAIRBANKS and others v. SMITH BLOOMFIELD and another.

The provisions in the Revised Statutes, relative to chattel mortgages, have no application to a mortgage, executed in a British province, upon a British vessel. It is by the rules of the common law that the validity of such a mortgage must be determined.

At common law, the continuance in possession of a mortgager of chattels is not *per se* evidence of a fraudulent intent, rendering the mortgage void, as against creditors and purchasers.

It is no objection to the validity of a mortgage, that it is given to cover future advances, as well as a present debt.

It is now settled law, that a mortgage of chattels is not rendered void, as against creditors, by a provision that the mortgager shall retain the possession for a definite period.

Such a provision gives to the mortgager a legal and exclusive right of possession, during the period so limited.

As the mortgagee, in this case, has no immediate right to the possession, his omission to take it is not even presumptive evidence of an intent to defraud creditors.

The possessory right of a mortgager, by force of such a provision in the mortgage, is a proper subject of a levy and seizure, under an attachment, as well as under an execution.

But if this possessory right is determined while the property mortgaged is still in the hands of the attaching officer, as the title of the mortgagee thereby becomes absolute, he has an immediate right, as owner, to claim the delivery of the property, and its further detention, under the attachment, is then an unlawful conversion.

When the attaching creditor is the sole plaintiff, in the suit in which the attachment is issued, and, as such, is alone entitled to the benefit of the process, he is bound to comply with the demand of a mortgagee, who has become the absolute owner, for the delivery of the property, by directing that delivery to be made by the attaching officer. In such a case, he has the same power to release the property from an attachment, by such a direction, that he would have to release it from an execution; and, by his refusal to give the direction, he renders himself liable for the value of the property.

The delivery, to which the mortgagee, as owner, is entitled, is unconditional, and he is under no obligation to pay, or tender payment of the costs and expenses of the attachment.

Judgment for plaintiffs, with costs.

(Before OAKLEY, CH. J., and DUNE, J.)

Heard, February; decided, March, 1856.

THE action was brought to recover damages, against the defendants, for the wrongful conversion, by them, to their own use, of a vessel or brigantine, called "The Bloomfield," of which the

plaintiffs claimed to be the legal owners, by virtue of a mortgage, executed and delivered to them, on the 23d of May, 1848, at Halifax, in Nova Scotia, by one J. G. D. McLellan, then the sole owner of the vessel. The mortgage was set forth, at large, in the complaint,* and by its terms was given to secure to the plaintiffs the payment, in three months from its date, of the sum of £800, Nova Scotia currency, with lawful interest: and it contained a provision that, if default should be made, in the payment of that sum, it should be lawful for the plaintiffs to enter into, possess, occupy, and enjoy the said vessel, and all her appurtenances, and to sell the same, at public or private sale, and give a valid title to the purchaser. The complaint then averred, that the said sum, of £800, was not paid to the plaintiffs, when due, and that they thereby became entitled, on the 23d of August, 1848, to the possession of the vessel, by virtue of the conditions of the mortgage; that, on the 25th of July, 1848, the defendants caused the vessel to be seized and taken possession of, by a constable of the town of Bridgeport, in Connecticut, under and by virtue of a process of attachment, issued out of the Superior Court of that state, at the suit, and for the sole benefit of the defendants, against the said J. G. D. McLellan, and that such seizure was made by the express direction of the defendants; that the plaintiffs, after they became entitled to the possession of the vessel, and whilst the vessel was still in the custody of the constable, demanded, from the defendants, that they would deliver to them the said vessel, or authorize the constable to make such delivery, but that the defendants refused to make such delivery, or give such authority, and thereby converted the vessel to their own use, to the damage of the plaintiffs of \$3,200, the amount due to them upon the mortgage.

The answer of the defendants, after taking issue upon the execution and delivery of the mortgage, admitted that the brigantine Bloomfield was seized and taken possession of, as alleged in the complaint, but denied that any demand of the vessel was made, by the plaintiffs, from the defendants, except in the city of New York, and averred that, when such demand was made, the vessel was still in the custody of the officer, in Connecticut, by virtue of the process

* *Vide* 2 Duer, 249. The complaint was amended, in conformity to the decision then made.

mentioned in the complaint, and that no offer was made to pay his fees, or any of the costs and expenses attending the execution of the process. The answer then denied that the defendants had any control over the attachment, or any power or authority to authorize or compel the officer, who executed the same, to deliver the possession of the vessel to the plaintiffs.

It then averred that possession of the vessel had never been delivered to the plaintiffs, and that the defendants, as creditors of McLellan, had full authority, under the laws of Connecticut, to issue the attachment, mentioned in the complaint, and, under the same, to seize and retain the possession of the vessel, as alleged in the complaint.

Upon these pleadings, the cause was tried, before Slosson, J., and a jury, in June, 1855. •

The following are the material facts established, by the evidence upon the trial:—

In May, 1848, one McLellan, being indebted to the plaintiffs, merchants in Halifax, executed to them, as security, the chattel mortgage, mentioned in the complaint, upon the vessel, called "The Bloomfield." The consideration, mentioned in the instrument, is £800 currency (\$3,200.) At the time of such execution, there was actually due, from McLellan to the plaintiffs, the sum of £566 5s. 10d., (\$2,265,) besides interest, being a portion of moneys advanced by the plaintiffs, previous to the mortgage, in repairing the said vessel, after she had been wrecked. The plaintiffs, at the same time, agreed to advance to McLellan further sums, and did, afterwards, advance to him £51, for the insurance of the vessel, and £35 in cash: the mortgage was intended to cover such future advances. By the terms of the mortgage, the plaintiffs were to become entitled to the possession of the vessel, upon McLellan's default, in payment, in three months. Such default was made; and, on the 23d day of August, 1848, the plaintiffs became entitled to the possession of the vessel. The plaintiffs held no other security for the indebtedness, and there was now due to them, on account thereof, the sum of £450 currency, (\$1,800.)

In July, 1848, while the vessel was at Bridgeport, in the state of Connecticut, the defendants, who reside, and are merchants, in the city of New York, sued, out of the Superior Court in the state of Connecticut, an attachment against the goods, &c., of the said

McLellan, under and by virtue whereof the said vessel was seized and taken possession of, by a constable, and was in his possession, under such attachment, on the 23d day of August following. The attachment, which was produced and read on the trial, is in these words:

“To the sheriff of the county of Fairfield, or his deputy, or either of the constables of the town of Bridgeport, within said county, greeting:

By authority of the state of Connecticut, you are hereby commanded to attach, to the value of eight hundred dollars, the goods or estate of John G. D. McLellan, of Nova Scotia, British North America, if the same should be found within the precincts, and summon him to appear before the Superior Court, to be holden at Danbury, within and for the county of Fairfield, on the first Tuesday of October, 1848, then and there to answer, unto Smith Bloomfield and Ellis S. Bloomfield, both of the city, county, and state of New York, copartners in trade, by the name and firm of S. & E. S. Bloomfield, in a plea that, to the plaintiffs, the defendant owes the sum of five hundred and fifty dollars, which, to the plaintiffs, the defendant justly owes, by book, to balance book accounts, as by the books of the plaintiffs, ready in court to be produced, fully appears; which debt the defendant has not paid, though often requested and demanded, which is to the damage of the plaintiffs the sum of seven hundred dollars, and, for the recovery thereof, with just costs, the plaintiffs bring this suit.”

The plaintiffs, after they became entitled to the possession, made a demand of the defendants, at the city of New York, for the said vessel. The defendants refused to deliver the vessel, or to authorize its delivery, by the constable, but did not allege that they had no control over the attachment, or that the fees and costs, attending its execution, must be paid. The defendants, subsequent to the commencement of this action, recovered, in the attachment suit, a judgment against McLellan, for \$684.57, under which the vessel was advertised for sale. The judgment was assigned by the defendants, for the benefit of the plaintiffs, who paid the amount thereof, and a stipulation was entered into that the damages, in case of a recovery against the defendants, should not exceed \$684.57, besides damages for detention.

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When the plaintiffs rested, the counsel for the defendants moved that the complaint should be dismissed, upon the following grounds:

1. That the mortgage was fraudulent, and void, as against the defendants, the creditors of McLellan.

2. That the plaintiffs had failed to show title, or a right to the possession of the vessel.

3. That the taking of the vessel, under the attachment, was lawful, and the plaintiff's only remedy was against the officer, in Connecticut.

4. That there was no proof of the conversion of the vessel by the defendants.

The court refused to grant such motion; to which refusal, the counsel for the defendants then and there excepted.

And thereupon the jury, by direction of the court, found a verdict for the said plaintiffs, for six hundred and eighty-four dollars and fifty-seven cents, subject to the opinion of the court at General Term, upon a case to be made, with liberty to turn the same into a bill of exceptions, and with liberty to the said defendants, upon the hearing, to move that the complaint be dismissed.

FEB. 7.—The cause was now argued upon the case so made.

R. S. Emmet, for the plaintiffs.

We insist that the plaintiffs are entitled to judgment upon the verdict. The mortgage was a valid transfer to the plaintiffs, of a limited property in the vessel, and of the right of future possession, if the debt, to which the mortgage related, should be unpaid when it became due. It is no evidence of fraud that the mortgager remained in possession, until default of payment. (*Bissell v. Hopkins*, 3 Cow. 166; *Hall v. Tuttle*, 8 Wend. 375; *Helbrook v. Baker*, 5 Greenleaf, 309.) Nor is it any objection to the validity of the mortgage that it was given to secure future advances as well as a present debt. The fact that the indebtedness was less than the amount mentioned on the mortgage can only affect the question of damages, and the sum actually due greatly exceeded the amount of the verdict. (*McGowan v. Young*, 2 Stew. 276.)

The detention of the vessel by the defendants, and their refusal to deliver it to the plaintiffs, when the latter, by force of the mortgage, had become entitled to the possession, was a tortious con-

version. If the original seizure of the vessel was lawful at all, it was only so in respect to the interest of the mortgager, who was then in possession, but when his right of possession ceased, and that of the plaintiffs, as mortgagees, accrued, the further detention of the vessel, against the will of the plaintiffs, was illegal, for the plain reason that the mortgager had no longer an attachable interest. (*Murray v. Burling*, 10 John. 172; *Newman v. Van Antwerp*, 2 Cow. 553; *Mattison v. Barcus*, 1 Comst. 295; *Hull v. Carnley*, 1 Kern. 501; vide, also, *Stuart v. Taylor*, 7 How. Pr. R. 251; *Fenn v. Bettleston*, 8 Law & Eq. R. 483.)

The demand was properly made, in this city, where the defendants resided, and the possession of the officer was, in judgment of law, the possession of the defendants. Moreover, in their answer, they admit and justify their possession and detention of the vessel. (*Libby v. Soule*, 1 Shep. 310; *Callkins v. Lockwoods*, 17 Connec. 154; *Forbes v. March*, 15 id. 385; *Robinson v. Armstrong*, 34 Maine, 145.)

C. Jones, for the defendants.

The defendants are entitled to a judgment, dismissing the complaint, with costs.

The mortgage was fraudulent and void, as against the defendants, as creditors of the mortgager. He continued in the use and possession of the vessel after the mortgage was given, and she was in his possession when seized under the attachment, and this, by the laws of Connecticut, by which the rights of the parties must be determined, was conclusive evidence of fraud. (*Potter v. Smith*, 5 Connec. R. 196; *Swift v. Thompson*, 9 id. 63; 2 Kent Comm. 525.) and for the same reason the mortgage was void by the common law of this state, as it existed before the Revised Statutes. (*Sturtevant v. Ballard*, 9 John. 337; *Jennings v. Carter*, 2 Wend. 446; *Diver v. McLaughlin*, id. 596.) The mortgage was, moreover, given for a larger sum than was advanced by the plaintiffs, and this was also a badge of fraud. But, passing over the objections to the title of the plaintiffs, we insist that there was no proof of a conversion of the property, by the defendants. The seizure of the vessel was lawful, and the defendants are not chargeable in this action for having directed the officer to make it. After the seizure they were not in the possession of the vessel, which, from that time, was in the custody of the law, and remained so, when

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the delivery of the possession was demanded from the defendants and it was not their duty, nor is it shown to have been in their power, to comply with the demand. On this point the case of *Jenner v. Jolliffe*, (6 John. 9, S. C.; 9 John. 581,) is a decisive authority. At any rate, the demand of the defendants, in the city of New York, was insufficient, especially as no tender was made of the officer's fees. But we contend that the defendants were not liable at all, and could not be made so, and that if the plaintiffs were entitled to any remedy whatever, their only remedy was against the officer in Connecticut.

BY THE COURT. DUER, J.—The plaintiffs, in our opinion, are entitled to judgment upon the verdict, for the amount, with interest and costs, for which it was rendered.

We can allow no weight to the objections that have been taken to the validity of the mortgage. It was executed in Nova Scotia, upon a British registered vessel, and it is, therefore, certain, that, in judging of its validity, we must be governed by the rules of the common law, and not by the provisions of the Revised Statutes, which can only apply to mortgages executed within, or relating to property at the time within, the jurisdiction of the state. As to the common law, without entering upon a discussion of the authorities, we are satisfied, that there never has been a period in its history, when the continuance in possession of a mortgager, until a default in payment, has been deemed *per se* evidence of a fraud, rendering the security void as against creditors or purchasers; nor have we been able to discover, nor can we believe, that, prior to the adoption of the Revised Statutes, an opposite doctrine ever prevailed in the courts of this state. The cases to which we were referred upon the argument, were all of them cases in which the instrument of transfer was, not a mortgage, but an absolute bill of sale.

The objection that the mortgage, with a view to cover future advances, was given for a larger sum than the plaintiffs had advanced at the time of its date, was not much pressed upon the argument, and is plainly untenable. The mortgage, when given, was certainly valid for the sum which the plaintiffs had then advanced, and was certainly valid, when they asserted their title, for the sum that was then due to them, and which, it appears, without

including subsequent advances, largely exceeded the amount for which the verdict was rendered.

Even were the provisions of the Revised Statutes applicable to the case before us, we should still entertain no doubt as to the validity of the mortgage. We consider the law in this state as now settled, that when the mortgager of chattels, by the terms of the mortgage is to retain the possession until a default in payment, the provision does not render the mortgage void, but gives to the mortgager a legal right of possession during the period so limited; and it is a necessary consequence that the mortgagee can have no right to interfere with or disturb the possession, which he has thus agreed that the mortgager shall retain. This doctrine was recognized by this court as the established law, in *Hull v. Carnley*, (2 Duer, 99,) and although our judgment in that case has since been reversed in the Court of Appeals, this particular doctrine was not only unquestioned, but was distinctly affirmed, and was even made a ground of the decision. The chattels mortgaged, in that case, were sold by the sheriff, under an execution, during the time the mortgager, by the terms of the mortgage, was entitled to the possession, and the plaintiff, the mortgagee, claimed to recover the value of the property upon the ground that the sale, being absolute and not limited to the possessory right of the debtor, was unwarranted and wrongful. The Court of Appeals held that the mortgage was a valid instrument, but reversed our judgment—which was in favor of the plaintiff—upon two grounds: First, that the sale was justified by the process under which the sheriff acted; and, second, that the plaintiff, not having the right of possession when the alleged injury was committed, was not warranted to bring the action. (1 Ker. p. 506-10.)

By the terms of the present mortgage, the plaintiffs were not to enter into the possession of the vessel until the expiration of three months from its date, and by a necessary implication the debtor, McLellan, was to retain the possession during this period. The plaintiffs, therefore, so far from being bound to take immediate possession, would have violated the rights of the mortgager, and rendered themselves liable as trespassers, had they attempted to do so. If it was neither their duty, nor within their power, to take the possession, it is impossible to say that their omission to do so was evidence of a fraudulent intent.

I shall close my observations on this branch of the case by referring to a somewhat recent decision in the Court of Exchequer, which it is, perhaps, to be regretted, escaped the attention both of this court and of the Court of Appeals in *Hull v. Carnley*. The decision has a direct bearing upon the questions before us, and affords a very clear illustration of the law, as now understood in England.

Fenn and others v. Bettleston and others, (8 Law & Eq. R. 483, S. C. 21; Law Jour. Excheq. N. S. 41.) The action was trover for goods, and the material facts of the case were these:—

A. conveyed the goods in question to B. by a deed, which, as it was conditioned to be void on the payment of a certain sum on a future day, was in effect a mortgage. The deed contained a provision that, until a default in payment of the principal sum or interest, A., the mortgager, his executors, &c., should be allowed to hold and enjoy the possession of the goods. A., during the time he was thus entitled to the possession, became a bankrupt, and the goods passed into the possession of his assignees, by whom, but while the right of possession given by the deed still continued, they were subsequently sold. B., the mortgagee, before that time, had transferred his title to the plaintiffs, who brought the action against the assignees to recover the value of the goods, upon the ground that the sale made by them, being absolute, was a wrongful conversion.

The Judge, upon the trial, directed a verdict for the plaintiffs, for the value of the goods, with leave to the defendants to move to set it aside, and enter a nonsuit. The cause was before the court upon this motion.

The validity of the deed was not contested, nor doubted; but the argument turned entirely upon the questions, whether the agreement, that the mortgager should retain the possession of the goods until the day fixed for the payment of the debt, gave him a legal right of possession for the stipulated term, or was a mere covenant, not affecting an immediate right of possession in the mortgagee; and whether the sale, made by the assignees, was justifiable, or a wrongful conversion. Upon the first question, the court held, that the effect of the agreement was not to give to the mortgager the possession and use of the goods, as a mere bailee, but a right of possession until the end of the stipulated

term; and, consequently, that, had the goods been taken by a third person from the custody of the mortgager, during the term, the plaintiffs, having then no present right of possession, could not have maintained an action for their recovery. But, upon the second question, they held, that the voluntary act of the assignees, in selling the goods, absolutely, during the term, as it prevented their delivery to the plaintiffs, in case of a default in payment, at the end of the term, was a conversion, which entitled the plaintiffs to judgment upon the verdict.

Overruling, as we must do, all the objections that have been raised, in the present case, to the validity of the mortgage, it follows, that the plaintiffs, on the 23d of August, became, at law, the absolute owners of the vessel, as there was then a default in the payment of their debt, and the temporary right of possession in the mortgager was then determined. The plaintiffs, therefore, from that day, were entitled, as owners, to demand and recover the vessel, or its value, from any and every person by whom the possession, no matter under what pretext or title, might then be held. If the vessel, therefore, was, on that day, and subsequently, in the possession, or under the control of the defendants, and they refused, upon a proper demand, to surrender her to the plaintiffs, they must be liable in the present action.

The defendants, on the preceding 25th of July, had caused the vessel to be seized, under an attachment against the property of McLellan, the former owner, and the complaint avers, and the answer, by not denying the allegation, admits, that the seizure was made by their express direction. The attachment, it appears, from its terms, was not issued for the general benefit of the creditors of McLellan, but was a process, in the commencement of a suit, instituted by the defendants, in their own names, and for their own exclusive benefit. It was, therefore, a proceeding, subject, like all other proceedings in the action, to their personal control, to be prosecuted and enforced, or revoked and abandoned, at their pleasure.

The regularity of the attachment, and the jurisdiction of the court, by which it was issued, are not denied; and, as the temporary interest of McLellan in the vessel had not then ceased, it is not denied that the original seizure was justifiable and lawful. Such an interest, it has been decided, in our own courts, is a

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proper subject of levy, under an execution, and, therefore, under an attachment; and it was conceded, by the counsel for the plaintiffs, and we shall, therefore, concede, that such is also the law in Connecticut. But, on the 23d of August, the interest of McLellan in the vessel wholly ceased, and we can perceive no reasons for doubting that, from that time, the detention of the vessel, under the attachment, contrary to the will of the plaintiffs, the true and only owners, was just as unlawful, as the original seizure would have been, if they had possessed, at that time, the same exclusive title. Hence, if this detention may be justly attributed to the acts or authority of the defendants, it is a necessary conclusion, that they were guilty of the conversion with which they are charged. As the answer admits that the delivery of the vessel was demanded from the defendants, on behalf of the plaintiffs, after the 23d of August, and before the commencement of this action, and as the fact was very clearly proved, upon the trial, it is evident that the subsequent detention of the vessel must be attributed to them, if it was in their power, and it was their duty, to have complied with the demand.

We think, that they had the legal power, and that it was their legal duty, to comply with the demand, and that they have rendered themselves liable to the plaintiffs, by their refusal.

What are the grounds, I propose next to consider, upon which this liability of the defendants, is denied?

It is said, that the vessel, when its delivery was demanded, was still held, by the officer in Connecticut, under the attachment, and was, therefore, in the custody of the law; and we were told that, where property is thus situated, it is settled law that the owner can maintain no action, for its recovery or value, but must seek his remedy in an application to the court under whose process, or order, the property is held; and, in support of this broad proposition, we were referred to the decision of the Supreme Court, in the early case of *Jenner v. Jolliffe*, as a controlling authority. (6 John. 9; 9 id. 381.)

The proposition, that property, in the custody of the law, cannot be made the subject of a new and separate action, when properly understood and limited, is undeniably true, and the case to which we were referred, the purport of which was greatly misunderstood, well illustrates the true meaning and application of the rule.

The plaintiff, in *Jenner v. Jolliffe*, brought the action, which was trover, to recover the value of a quantity of timber, of which he was the owner, and which the defendants had caused to be seized, under an attachment, in Canada; but, as it appeared, that the process was regular, on its face, was issued by a court of full jurisdiction, and, by its terms, directed the seizure of the very property in question, as that of the plaintiff, who was named as the defendant in the suit, the Supreme Court properly, and necessarily, held, that the action was not maintainable. This case, therefore, only proves what, probably, has never been denied, or doubted, that a defendant, in a suit in which his property is seized or attached, under a process or order of the court, and to abide its final determination, is not permitted to try the validity of the proceeding—when the jurisdiction of the court is undoubted—as plaintiff, in a separate action; for this is the very question to be determined in that to which he is already a party, as the defendant.

But the case is widely different, when the property seized is that of a stranger to the action, and the seizure is not directed by the terms of the process. The property seized is not then in the custody of the law, for the seizure is, itself, an unlawful act, which renders the officer making, and the plaintiff directing it, at once, liable as trespassers, and gives, to the true owner, an immediate right of action against them. The familiar case is, where the goods of A. are seized, under an execution against the property of B.; and whether the seizure is made under an execution, or under an attachment, is plainly immaterial. What has been said of an unlawful seizure, must be equally true of an unlawful detention. Where the goods detained belong to a stranger to the action, and their detention is not justified by the terms of the process, they are not in the custody of the law, and the owner is, at once, entitled to the remedy, by an action against those who wrongfully withhold from him the possession to which he is entitled. Here, the vessel, when the interest of McLellan had ceased, was no longer in the custody of the law, and, as its detention was no longer justified by the terms of an attachment, which related to the property of McLellan alone, the plaintiffs had an immediate right of action against those to whom the wrongful detention was imputable.

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We think, that in reason, and in law, it was imputable to the defendants.

The demand of the vessel was properly made from the defendants themselves, and was properly made in the place where they were found. They were the sole plaintiffs in the suit in which the attachment was issued—it was by their direction that the vessel was seized, and hence, the officer, holding the attachment, acted as their agent in making the seizure. It was not a manual delivery of the vessel that was asked, but an order, directing the officer, as their agent, to make that delivery to the plaintiffs. It was at their own peril—the peril of showing that the plaintiffs were not, as they claimed to be, the owners of the vessel, that they refused to comply with such a demand; and, as to their power, to direct a delivery by the officer, we cannot doubt that they had the same right, to release the property from an attachment, in which they alone were interested, that they would have had to release it from an execution, had such been the form and nature of the process by which it was held; and, if such was their right, its exercise was their duty.

As to the objection, that, when the vessel was demanded, no tender was made of the fees of the officer, and of the other costs of the attachment, it scarcely deserves attention. No such payment, or tender, was required; and, had it been required, the plaintiffs were under no obligation to comply with the request. The delivery, to which, as owners of the vessel, they were entitled, was unconditional, and, by refusing to make it, the defendants converted the property to their own use. It is plain, from the evidence, that they refused to deliver the vessel, because they meant to retain it, under the attachment, in order that its proceeds, when sold, might be applied to the satisfaction of their own debt. It is plain, that, with this view, they meant to deny, wholly, the title of the plaintiffs; and, as the denial has proved to be groundless, they have no right to complain that judgment is rendered against them.

Judgment for plaintiffs, with costs.

WILLIS, appellant, v. HAVEMEYER, respondent.

To a complaint which charges that the defendant, without cause, caused the plaintiff to be arrested and sent to prison, and detained there until the enforced payment of a sum for his deliverance, an answer which states, in proper form, that the plaintiff was brought before the defendant charged with an offence which the defendant had jurisdiction to try and decide, a trial, according to law, and a decision which he was competent to make, and the issuing of process to enforce it, and that the imprisonment was by virtue thereof, and in execution of such decision, is sufficient.

A reply, which does not controvert any of the alleged facts requisite to confer jurisdiction on the defendant to hear and determine such offence, or the fact of making the decision and issuing of the process set out in the answer, was demurrable (in Jan. 7, 1851) for insufficiency.

When not required by statute, it is not necessary to the protection of an officer of special jurisdiction, that a formal record of his decision should be made and filed. It is enough that his decision was reduced to writing at the time it was made.

When a statute confers authority on such an officer to try a specified class of offences, and punish by fine or imprisonment, it necessarily confers authority to issue process to enforce his judgment.

A reply to such an answer, alleging matters which, if true, would show the decision to be merely erroneous, and not void, is insufficient. While unreversed it will protect the officer making it.

Under the code, it is sufficient, as a pleading, in justifying under the judgment or final determination of an officer, or a court of special jurisdiction, to state that such judgment or determination was duly made. It is only when such allegation is controverted that the officer must establish at the trial the facts conferring jurisdiction.

(Before OAKLEY, CH. J., and DUNE and BOSWORTH, J.J.)

Heard, February; decided, March, 1856.

THIS action came before the court on an appeal, by the plaintiff, from a judgment in favor of the defendant, upon a demurrer interposed by the defendant to the plaintiff's reply to the defendant's answer.

The action was commenced on the 28th of December, 1850. The answer was served on the 27th of January, 1851. The reply on the 21st of February, 1851. The demurrer on the 17th of March, 1851.

It was tried before Mr. Justice Duer, in October, 1851. The pleadings are as follows:

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COMPLAINT.—The plaintiff complains against the defendant, for that the defendant, on or about the sixth day of January, 1849, in the city and county of New York, without any justifiable cause, against the law of the land, and against the will of the plaintiff, caused the said plaintiff to be arrested and detained in and about the city hall of said city for some time, and caused the said plaintiff, by a pretended commitment, to be forcibly conveyed to the city prison of said city, and the said plaintiff was, in consequence of said pretended commitment, confined in the said prison for a considerable period of time, to wit, the period of sixteen hours or thereabouts, and until the enforced payment of a sum of money for his deliverance therefrom, by means whereof the plaintiff was, during all that time, prevented from following his lawful and necessary affairs and business, which he otherwise would and might have done, was put to great trouble and inconvenience, was deprived of his liberty, and greatly wounded in his feelings, wherefore the plaintiff demands judgment against said defendant for the sum of one thousand dollars, and the costs of this action.

ANSWER.—The defendant, William F. Havemeyer, for answer to the complaint of the plaintiff in the above entitled action, on information and belief, denies that he caused the plaintiff to be arrested, as is in said complaint alleged.

And this defendant further, on information and belief, says, that on or about the sixth day of January, 1849, John A. Ricard, who was then a police officer of the city of New York, brought a person, who gave his name as Edward Willis, and whom this defendant believes to be the said plaintiff, before this defendant, who was then and there the mayor of the city of New York, duly elected and qualified and acting as such mayor, at the mayor's office in the city hall of the city of New York, and charged the said Edward Willis with having, within the view of the said officer, committed the offence of driving a wagon for the transportation of goods, wares and merchandise, for hire, without being duly licensed by the mayor of the city of New York, contrary to the ordinances of the mayor, aldermen, and commonalty of the city of New York, passed May 30, 1848. That this defendant, by virtue of the power and authority in him vested as such mayor, did then and there proceed to hear, examine into, and determine

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upon the said charge; and then and there, on the testimony of the said John A. Ricard, (who was duly sworn,) and on the confession of the said Edward Willis, which said testimony and confession were reduced to writing, and verified by the affidavit of said Ricard, did then and there convict the said Edward Willis of the offence aforesaid, and this defendant did then and there make up and sign a record of said conviction; and this defendant did then and there declare and deem the said Edward Willis guilty of a misdemeanor, and order and adjudge that the said Edward be fined in the sum of ten dollars, or in default of the payment of such fine that he be imprisoned in the city prison for ten days, which said record of conviction, with the said testimony and confession therein contained, are in the following words, that is to say:—

City and County of New York, ss.

John A. Ricard, Cart Inspector, being duly sworn, deposes and says: that Edward Willis was, this day, driving one horse before a wagon, having goods on it, and driving for hire, without license according to law.

JOHN A. RICARD.

Sworn to before me, January 6th, 1849,

WM. F. HAVEMEYER, Mayor.

Edward Willis states as follows:—Examinant drives a wagon for his father, Anson Willis. I carry goods when I get employed, and receive pay for it. I drive it as an express wagon. I am twenty years old the 10th of this month.

EDWARD WILLIS.

Taken before me, January 6, 1849,

WM. F. HAVEMEYER, Mayor.

The defendant, Edward Willis, being convicted on his own confession, and upon the testimony of John A. Ricard, of driving a wagon for the transportation of goods, wares, and merchandise, for hire, without being duly licensed by the mayor of the city of New York, contrary to the ordinance of the mayor, aldermen, and commonalty of the city of New York, passed May 30, 1848, is, pursuant to section 10, article 8d, of an act to amend an act entitled

—D.—V.

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"an act for the establishment and regulation of the police of the city of New York, passed May 7th, 1844," passed May 13th, 1846, by a two-third vote, deemed guilty of a misdemeanor.

It is hereby ordered and adjudged, that Edward Willis be, and he is fined, in the sum of ten dollars, or, in default of the payment of such fine, that he be imprisoned in the city prison for ten days.

New York, Jan. 6th, 1849.

WILLIAM F. HAVEMEYER, Mayor.

And this defendant further, on information and belief, says: That if the said plaintiff was detained in the city hall for some time, as alleged in said complaint, it was only during a period of time necessary and proper to conduct the examination and determination of the complaint aforesaid, and no longer.

And this defendant, on information and belief, further says: that the said Edward Willis did not pay the said fine so imposed upon him, but made default therein, after a reasonable time allowed him so to do, whereupon the defendant, acting as such mayor, did, in due form of law, make an order, warrant or commitment, under his hand and seal, by which the constables and policemen of the city of New York, and every of them, were commanded to convey to the city prison of the city of New York, the body of Edward Willis, and deliver him to the keeper thereof and the said keeper was thereby commanded to receive into his custody the body of the said Edward Willis, and safely keep the said Edward Willis in his custody in the said prison, until he shall pay the sum of ten dollars, but the said imprisonment not to exceed the space of ten days, or be thence delivered by due course of law, of which said order, warrant or commitment, the following is a copy, that is to say:—

City and County of New York, ss.

[L. s.] By Hon. William F. Havemeyer, Mayor of the city of New York, to the constables and policemen of the said city, and every of them, and to the keeper of the city prison of the said city:

These are in the name of the people of the state of New York, to command you, the said constables and policemen, and every

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of you, to convey to the said prison the body of Edward Willis, and deliver him to the keeper thereof, and you, the said keeper, are hereby commanded to receive into your custody, in the said prison, the body of the said Edward Willis, who stands charged before me, on oath of John A. Ricard, with having, on the 6th day of January, 1849, at the city of New York, in the county of New York, also upon the confession of said Edward Willis, with driving a wagon for the transportation of goods, wares, and merchandise, for hire, without license from the mayor of the city of New York, contrary to the ordinance of the mayor, aldermen, and commonalty of the city of New York, passed May 30th, 1848; he is, therefore, pursuant to section 10 of article 3, of an act to amend an act, entitled "an act for the establishment and regulation of the police of the city of New York, passed May 7th, 1844," passed May 13th, 1846, by a two-third vote, deemed guilty of a misdemeanor, whereupon I ordered and adjudged that the said Edward Willis pay a fine of ten dollars, in which he has made default, that you safely keep the said Edward Willis in your custody, in the said prison, until he shall pay the sum of ten dollars, but the said imprisonment not to exceed the space of ten days, or be thence delivered by due course of law.

Given under my hand and seal this 6th day of January, 1849.

WILLIAM F. HAVEMEYER, Mayor.

And this defendant further, on information and belief, says: that the said Edward Willis was only committed to the said prison in compliance with said commitment, warrant or order, and therein detained for a short space of time, but not over the space of sixteen hours, and until he having paid the said fine of ten dollars, was then discharged.

And this defendant denies that he caused the said plaintiff to be confined in the said prison, as is in said complaint alleged, by any other agency or means, or for any other cause or reason, than those hereinbefore set forth. And this defendant avers, that during all the proceedings aforesaid, he acted in good faith, and in the faithful discharge of his duty as such mayor, and under and by virtue of the authority with which he, by law, as such mayor, was invested, and according to the statute in such case made and provided, and more particularly under and by virtue

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of an act, entitled "an act relative to the powers of the common council of the city of New York, and the police and criminal courts of said city," passed May 23d, 1833, and also an act to amend an act, entitled "an act for the establishment and regulation of the police of the city of New York, passed May 7th, 1844,"—passed May 13th, 1846, by a two-third vote,—and in accordance with an ordinance of the mayor, aldermen, and commonalty of the city of New York in common council, passed May 30th, 1848, and an ordinance of the said, the mayor, aldermen, and commonalty of the city of New York convened, passed May 14th, 1839, as by reference thereto will more fully appear. And this defendant further says, that he had good, sufficient, reasonable, and justifiable cause to convict the said Edward Willis, as aforesaid.

And this defendant, on information and belief, says: that at the time of such offence and proceedings, and for a long time thereafter, the said Edward Willis was a minor, under the age of twenty-one years.

And this defendant further says, that on the said sixth day of January, 1849, and for a long time before, and also for a long time subsequent thereto, he, the said defendant, was mayor of the city of New York, and as such duly elected and qualified. And that he, the said defendant, as such mayor, and not otherwise, on the said sixth day of January, 1849, as it was right and lawful for him to do, on the complaint aforesaid, for the offence aforesaid, being made before and to him as such mayor, did proceed to hear and determine the said complaint, and the said Edward Willis, having been of said offence duly convicted by this defendant, as such mayor and not otherwise, imposed the said fine of ten dollars as aforesaid, as also made the record of conviction aforesaid under his hand, and was right and lawful for him to do. And this defendant further saith, that the said plaintiff did not pay the fine so imposed, but made default therein, whereupon this defendant, as such mayor, and not otherwise, as it was right and lawful for him to do as such mayor, did make and issue, or cause to be made, issued and delivered to one of the police officers of the city of New York, the order, warrant, or commitment above set forth, which said officer, as this defendant states on information and belief, under and by virtue of the said commitment, on the said 6th day of January, 1849, took and imprisoned the said plaintiff, as it

was right and lawful for him to do, and which said warrant or commitment, this defendant believes, is the pretended commitment referred to in this complaint.

And this defendant says, that the said complaint and offence came, and were legally within his jurisdiction, as such mayor as aforesaid.

And this defendant further says, that some few days prior to the sixth day of January, 1849, the said Edward Willis was charged before this defendant with another and like offence to that above stated and set forth, and this defendant, as it was the first offence on which said Edward Willis had been charged before him, permitted him, in the exercise of his discretion as such mayor, to depart without fine or other punishment, but with an admonition that a second offence would meet with the punishment appointed by law.

And this deponent further says, that he has not any knowledge sufficient to form a belief whether by means of said commitment, the plaintiff was, during all the time thereof, prevented from following his lawful and necessary affairs and business, or whether he might or would have done so, or whether the said plaintiff had any lawful and necessary affairs and business, or whether the plaintiff was put to great trouble and inconvenience, or whether he was deprived of his liberty otherwise, or whether he was greatly wounded in his feelings than is above stated.

And this defendant, for greater certainty, prays leave to refer to all and singular the proceedings on said complaint, and to said testimony, confession, and record of conviction, and to said warrant or commitment, as well as to the said ordinances of the said, the mayor, aldermen, and commonalty of the city of New York.

And this defendant prays judgment in his favor in this action against the plaintiff, for his costs in this action.

The plaintiff, replying to the answer of the defendant, in the above entitled action, says he did not confess that he committed the offence mentioned and referred to in said answer, as is therein alleged.

And plaintiff, as to the allegation of said defendant, that he, said defendant, made up and signed a record of the conviction in said answer mentioned, denies that he, the said plaintiff, has any

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knowledge or information thereof, sufficient to form a belief in regard thereto.

And plaintiff denies that he committed the offences mentioned and referred to in the answer of said defendant, and that defendant had good, sufficient, reasonable and justifiable cause to convict him, said plaintiff, as stated in the answer.

And plaintiff denies that he has any knowledge or information, sufficient to form a belief, as to whether he, said plaintiff, was detained in the City Hall only during a period of time necessary and proper to conduct the examination, and determination of the complaint, in said answer mentioned.

And plaintiff further says, that, at the time of the alleged commitment of the offence, first mentioned and referred to in the answer of said defendant, he, said plaintiff, was driving a wagon, containing goods, in the lawful and necessary prosecution of the business of an express, established and running between the city of New York and the village of Croton Falls, in said state, and for no other purpose whatever, which driving, as aforesaid, in said lawful and necessary prosecution of said business, was well known to the said defendant, at the time of plaintiff's said arrest, detention, and conveyance to prison, and which said driving is the driving mentioned and referred to in defendant's said answer.

The defendant demurs to the reply of the plaintiff, because the said reply, to the defence set up by the answer of the defendant, is insufficient in law, and the defendant states the grounds of his demurrer as follows:—

1. It is admitted, by the plaintiff, that the complaint against the plaintiff was made; that the defendant, as mayor of the city of New York, had jurisdiction of said complaint; that a judicial hearing and determination was had thereupon, and that the plaintiff was convicted thereof, as alleged in the answer. If it be admitted that the plaintiff was driving an express wagon, as alleged in the reply, this is no sufficient reply, in law, to the answer of the defendant.

2. It does not appear, by the reply, but that the allegation of the plaintiff, in his said reply, that he was driving an express-wagon, was controverted, and proved not to be true, on the hearing of said complaint by said defendant, as mayor, nor but that it

was then and there decided, by the said defendant, to be no defence to said complaint.

8. The reply departs from the complaint, and, so far as any cause of action is stated therein, it is a new and different cause of action from that stated in the complaint, and renders it uncertain for what the plaintiff seeks to recover in this action.

Wm. M. Brackett, for plaintiff.

S. J. Tilden, for defendant.

Mr. Justice Duer assigned the following reasons, in support of the judgment, which he ordered:—

BY THE COURT. DUER, J.—Upon an attentive consideration of the pleadings, in this case, and of the law applicable thereto, I am satisfied, contrary to my impressions upon the hearing, that the demurrer to the reply must be allowed. The following are, briefly, the grounds of my decision:

1. That the jurisdiction of the defendant, as mayor of the city, is sufficiently alleged in the answer, and that these allegations are not denied in the reply. I must, therefore, consider the original jurisdiction as admitted.

2. That the making up and filing of a record were not necessary to render lawful the subsequent commitment of the plaintiff. The averment of these facts, in the answer, was, therefore, unnecessary, and, consequently, the denial, in the reply, forms an immaterial issue.

3. That, as the defendant had jurisdiction of the offence, of which he convicted the plaintiff, the conviction must be regarded as conclusive, upon all the questions, both of fact and of law, which the judgment of the magistrate, of necessity, involved.

4. Hence, all the issues of fact, which are raised in the reply, must be regarded as immaterial, since they all relate to questions which were necessarily determined, by the defendant, in pronouncing a judgment of conviction.

5. That, however erroneous such determination may have been, it is a complete bar to any action for a false imprisonment, unless the acts of the legislature, and the ordinance of the corporation,

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under which the defendant acted, must be pronounced unconstitutional and void.

6. That the misdemeanor, of which the plaintiff was convicted, belongs to a class of offences, in relation to which, a summary jurisdiction, without the intervention of a jury, was known, and universal, in this state, before the adoption of the constitution of 1779.

7. That, consequently, the acts of the legislature in question, and the ordinance passed by the corporation in pursuance thereof, do not violate any of the provisions of the constitution of 1821, but are fully sanctioned by the construction that has been given to the provisions that are alleged to have been violated, and to similar provisions in the constitution of 1779, not only in repeated acts of the legislature, but by an unbroken series of decisions in the courts of justice.

The defendant is entitled to judgment, with costs; but twenty days are allowed to the plaintiff, to amend his reply, upon payment of the costs of the demurrer and hearing.

BOSWORTH, J.—The answer contains, first, a denial that the defendant "caused the plaintiff to be arrested," as stated in the complaint. This puts at issue allegations of the complaint, which are, of themselves, sufficient to constitute a distinct cause of action.

Second. The residue of the answer, contains matter which is pleaded as a defence to, or justification of the charge, that the defendant "caused the plaintiff, by a pretended commitment, to be forcibly conveyed to the city prison," and to be detained there.

The reply must, of necessity, be regarded as applying only to so much of the answer, as sets up a justification of the second cause of action, stated in the complaint.

The substance of the justification is, that the defendant was mayor of the city of New York, and that, as such mayor, upon a complaint made against the plaintiff, of having violated an ordinance of the mayor, aldermen and commonalty of the city of New York, passed May 30, 1848, he investigated the matter, upon the plaintiff being arrested and brought before him, on said complaint, and convicted him of the alleged offence, and adjudged that the plaintiff be fined, in the sum of \$10, or that, in default of the payment of such fine, he be imprisoned ten days in the city prison, and that such judgment was duly given.

The Code provides, that, "in pleading a judgment, or other determination of a court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment, or determination, may be stated to have been duly made or given. If such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts conferring jurisdiction." (Code, § 161.)

The natural order, of considering the points to be decided, involves the inquiries:

First. Does the answer conform, substantially, to § 161 of the Code?

Second. Does the reply, if the answer is sufficient, set up matter which avoids it, or deny any of the allegations of the answer, which it would be necessary to prove, to establish the defence which the answer sets up?

This part of the answer, of the defendant, states that the proceedings before him, and the acts done by him, by force and in pursuance of which the defendant was committed to prison, and detained in custody, were had before him, and done by him, as mayor of the city of New York, and "that the said complaint, and offence, came and were, legally, within his jurisdiction, as such mayor as aforesaid."

This is preceded by averments, that the plaintiff was brought before him, charged with having committed "the offence of driving a wagon, for the transportation of goods, wares and merchandise, for hire, without being duly licensed by the mayor of the city of New York, contrary to the ordinances of the mayor, aldermen and commonalty of the city of New York, passed May 30th, 1848;" an examination into, and determination upon, the charge; the making of a record of the proceedings and judgment; the issuing of process, pursuant to, and to carry the decision into effect; that he acted under, and by virtue of, authority, with which he, as such mayor, was invested by statutes of the state, which are pleaded by their title, and the date of their passage, and in accordance with ordinances, which are also pleaded, by stating the date of their passage: that, in all these proceedings, "he acted in good faith, and in the faithful discharge of his duty, as such mayor, and under and by virtue of the authority with which he, by law, as such mayor, was invested, and according to the statute in such case

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made and provided, and, more particularly, under and by virtue of" certain acts and ordinances to which the answer refers.

I think these allegations substantially satisfy section 161 of the Code.

Unless the reply puts in issue facts necessary to be proved to sustain some allegation of the answer, essential to a complete defence, or sets up some fact which, being admitted or proved, would establish that the determination of the defendant, as mayor, was void, or the proceedings before him were a nullity, the demurrer was properly sustained.

A reply could be demurred to, for insufficiency, at the time the pleadings in this action was conducted. The demurrer was put on the 17th of March, 1851. The first sentence of the reply states an immaterial fact. Whether the defendant made up and signed a record of the conviction, is not matter which affects the question of his jurisdiction to entertain the complaint, or try the defendant for the alleged offence.

The act of 1846, chap. 302, and sections 20 and 21 of the act of 1833, chap. ii., page 14, do not require any record of the conviction to be signed and filed.

If it be assumed essential to a justification under it, that every judicial determination should be in writing, the answer shows that at the time the decision was made, the defendant reduced to and made in writing, "an order, warrant, or commitment, under his hand and seal," which states the fact, that the plaintiff had been, that day, convicted before him of the alleged offence, the proceedings had, which resulted in such conviction, and the judgment rendered, as well as the default of the plaintiff to then pay the fine imposed upon him.

In the absence of any statute requiring a record of the conviction to be made and signed, we regard this "order, warrant, or commitment" as a sufficient written record or memorial of the trial or judgment. (*Van Wormer v. Mayor, &c., of Albany*, 15 Wend. 262-265; and see *Meeker v. Van Rensselaer*, id. 397-399.)

The point has not been made nor suggested, that, assuming or conceding the defendant to have had jurisdiction of the offence charged against the plaintiff, and to have rendered the judgment in question, he had no authority to issue a warrant to effect its execution.

If such a point had been raised, it would, perhaps, have been a sufficient answer to it that, having jurisdiction of the offence, and to render judgment, he had power to issue process to execute the judgment. (4 Bl. Com. 290; 1 Chitty's Crim. Law, 85.) The statutes should not be so construed as to render them wholly nugatory.

The plaintiff's denial that he committed the alleged offence, or that the defendant had good and sufficient cause to convict the plaintiff, puts in issue no allegation which affirms jurisdiction of the defendant to entertain the complaint, or give the judgment. This, at most, affirms that the judgment was erroneous. But if erroneous, so long as it is conceded that it was rendered by an officer of competent jurisdiction, and under a form of proceeding authorized by law, it will protect the officer who gave it, for his acts, in investigating the alleged offence, and in issuing proper process to carry the judgment into execution. (*Brittain v. Kinard, et al.*, 1 Brod. & Bing. 432.)

A denial that he was not "detained in the city hall, only during a period of time necessary and proper to conduct the examination and determination of the complaint in said answer mentioned," puts in issue no fact essential to a full justification of the second cause of action. No detention of the plaintiff, in the city hall, by the defendant, is alleged, except as part and parcel of a transaction of which the plaintiff complains, by averring that the defendant "caused the plaintiff to be arrested and detained in and about the city hall of said city for some time." The fact of causing such an arrest is denied, by the part of the answer not now under consideration.

This action does not profess to be one to recover damages for an abuse, by the defendant, of his powers as mayor, and exercising them tyrannically and oppressively by the manner in which he conducted proceedings, of which he had jurisdiction.

The only other matter, contained in the reply, affirms that the act of the defendant, and which was alleged to be a violation of the ordinance of May 30, 1848, was "driving a wagon, containing goods, in the lawful and necessary prosecution of the business of an express, established and running between the city of New York and the village of Croton Falls, in said state, and for no other or different purpose whatever," and that "the defendant, at the time

of the plaintiff's arrest, detention, and conveyance to prison, well knew this."

There is no averment that this wagon, in transacting the business in which it was employed, was ever driven, or run, out of the limits of the city of New York. For aught that is averred, or can be justly inferred, from the averments made, the wagon may have been used, exclusively, within the city of New York, in carrying goods to and from the Harlem railroad-dépôt, which were to be taken out of, or had been brought within the city, by an express company, or by a person engaged in that business, who conveyed all articles from the dépôt out of the city, or brought all articles to it from the country, upon that railroad, and in the cars of the railroad company.

Enough is not stated to show that it was not a question, proper to be determined by the mayor, whether driving an express-wagon, in transporting goods, within the city, for hire, was a violation of that ordinance.

The reply does not allege that an express-wagon is, by the terms of the ordinance, excepted from its operation, nor does it set forth the ordinance itself. The defendant, if the allegations in his answer, showing jurisdiction to entertain the complaint, and give the judgment he rendered, had been controverted by the reply, might have shown the existence of an ordinance, of the date of the one said to be violated, which, by its terms, or fair meaning, prohibited the driving of an express-wagon, as well as any other wagon, which was employed in carrying goods, for hire, exclusively, within the limits of the city; or he might have shown one, the terms of which would have rendered it a proper subject of inquiry, and determination, whether the driving of such an express-wagon came, fairly, within its prohibitions.

In either case, his judgment, while in force, and unreversed, rendered in proceedings conducted according to law, would protect him against an action for hearing the complaint, and issuing process to execute his judgment, the reply not denying that "he acted in good faith, and in the faithful discharge of his duty, as such mayor." (*Brittain v. Kinnard, et al.*, 1 Brod. & Bing. 432.)

It necessarily follows, that, whether the act which the defendant had done violated the ordinance or not, or, in other words, whether the defendant had done any act prohibited by it, was the question

to be tried. The mayor, acting "in good faith, and in the faithful discharge of his duty, as such mayor, and under and by virtue of the authority with which he, by law, as such, was invested," decided that the defendant had done an act which that ordinance prohibited, and he gave such a judgment as he was authorized to render against a person convicted of the offence of violating it.

The reply, as we think, is clearly insufficient, and the plaintiff was entitled to judgment, on the demurrer, assuming the answer to be good, in form and substance, under the Code.

We consider it good, in form and substance, unless it is apparent that the laws, under which the proceedings against the plaintiff were had, are unconstitutional and void.

Section 10, of article 3, of chapter 302, of the laws of 1846, (p. 408,) and sections 20 and 21, of the act of 1833, chapter ii., (p. 14,) taken together, in effect, provide, that the mayor, aldermen and commonalty of the city of New York, in common council convened, may pass such ordinances as they may deem necessary, for the licensing, and otherwise regulating the use and employment, in said city, of "carts and cartmen, cabs and cabmen, hackney-coaches and hackney-coachmen, stages, and accommodation coaches, or omnibuses, and their drivers, and public porters, and handcartmen," and that "all persons offending against such ordinances shall be deemed guilty of a misdemeanor, and be punished, on conviction, before any" of certain magistrates named, of whom the mayor is one, "by a fine, not exceeding ten dollars, or, in default of the payment of such fine, by imprisonment, provided such imprisonment does not exceed ten days."

These statutes are pleaded, by their title, and the date of their passage, and expressly authorize the mayor to try all persons offending against any ordinance, made pursuant to the power which they grant, and also authorize such a judgment to be rendered, as was given against the plaintiff, by the defendant, as mayor.

We can not hold this statute unconstitutional, without adjudging that all similar offences cannot be tried summarily, without a jury, and thus deciding, that the construction given to the laws regulating the trial of such offences, throughout our whole judicial history, has been erroneous. We think the order appealed from is not erroneous, and it must be affirmed; but the plaintiff may amend his reply, in twenty days, upon payment of the costs of the demurrer and of this appeal.

REUBEN ROSS. v. CHESTER BEDELL.

Seem, that the question whether the protest of a foreign bill of exchange is properly authenticated depends upon the law of the state where payment was demanded and the protest made.

A seal, stamped upon paper of sufficient tenacity to retain the impression, is a seal within the strictest rules of the common law.

When a certificate of protest is properly authenticated by the seal of the notary, no proof of his signature, or of his authority to act, is required.

When the certificate states that the notary went to the place of business of the acceptor of a bill, to demand its payment, and found the doors closed, it will be intended that he took the bill with him so as to enable him to demand its payment in the usual and proper form.

The holder of a negotiable bill or note is not bound to prove that he gave value for it, merely because it has been proved, on the part of the defendant, that the bill or note was without consideration as between the immediate parties, i. e., was accommodation paper.

But when it appears that the bill or note was fraudulently negotiated or put into circulation, the plaintiff must prove a valuable consideration to entitle him to recover.

New trial; costs to abide event.

(Before DURN, BOEWORTH and SLOSSON, J.J.)

March, 1856.

THIS was an action by the plaintiff, as endorsee, against the defendant, as drawer of a bill of exchange. The complaint averred that the bill was drawn by the defendant, in the city of New York, on one James Gordon, at the city of Philadelphia, on the 15th of October, 1854, and required Gordon to pay to the order of the defendant, two months after date, the sum of \$1,000, and that the same was endorsed by the defendant, and delivered to the plaintiff, who purchased the same for a valuable consideration. That Gordon accepted the bill, which was duly presented to him for payment when it became due; that payment was refused and due notice of such refusal given to the defendant.

The defence in the answer was, that the bill was accepted for the accommodation of the defendant, that it was placed by him in the hands of a third person by whom it was fraudulently put into circulation, and that the plaintiff was not a holder for value. It

also denied that the bill had been duly presented for payment to the acceptor.

The cause was tried before Oakley, Ch. J., and a jury, in April, 1855.

The plaintiff, upon the trial, produced the bill, and proved its acceptance by Gordon, and to prove demand and refusal of payment, and notice to defendant, he offered in evidence the following notarial certificate.

The counsel for the defendant objected to the evidence. The objection was overruled, and the counsel excepted.

The certificate, after giving a true copy of the bill, proceeded as follows:—

Be it known, that on the day of the date hereof, at the request of The Philadelphia Bank, the holder of the original bill of exchange, of which a true copy is above written; I, Edward Hurst, Notary Public for the commonwealth of Pennsylvania, by lawful authority duly commissioned and sworn, residing in the city of Philadelphia during the usual hours of business for such purposes, went repeatedly to the place of business of the acceptor, No. 46 Walnut street, to demand the payment thereof, which was not obtained, said place being closed and unattended, and no person there to answer about or to pay said bill.

Whereupon I, the said notary, at the request aforesaid, have protested, and do hereby solemnly protest, against all persons, and every party concerned therein, whether as maker, drawer, drawee, acceptor, payer, endorser, guarantee, surety or otherwise, howsoever against whom it is proper to protest, for all exchange, re-exchange, costs, damages, and interest suffered and to be suffered for want of payment thereof: of which demand and refusal I duly notified the drawer and endorsers.

[L. S.] Thus done and protested at the city of Philadelphia aforesaid, the fourteenth day of December, 1854.

EDWARD HURST, Notary Public.

The only seal upon the certificate was an impression of a seal upon the paper.

The plaintiff then, after proving the amount due upon the bill, rested.

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The defendant then proved that the bill had been accepted by Gordon, for his accommodation, and in addition to this proof the following facts were admitted, that the defendant had borrowed of one Smith \$500, upon a pledge of the draft, and afterwards one S. B. Pree went to Smith and paid him the loan, acting, as he stated, for the defendant, and as his clerk, and that Smith delivered the bill to him to be returned to the defendant, which he promised to do, and that these facts occurred a few days before the maturity of the bill. The only additional fact proved on the trial, necessary to be mentioned, is that the defendant had given notice to the acceptor not to pay the bill.

The Chief Justice directed a verdict for the plaintiff, for the sum \$1,055.93, subject to the opinion of the court at General Term, upon the facts in evidence, and judgment, in the mean time, to be suspended.

J. R. Pomeroy, for the plaintiff.

We claim that the plaintiff is entitled to judgment upon the verdict. The principal question is, whether the Chief Justice erred in allowing the notary's certificate to be read in evidence. The seal was sufficient, by the laws of Pennsylvania, and was *prima facie* evidence that the notary was duly commissioned. (*Long v. Ramsey*, 1 Ser. & Raw. 72; *Browne v. Philadelphia Bank*, 6 id. 482.) Nor even by the law of this state is a seal impressed simply upon paper for that reason invalid. (4 Kent's Com. 452; 17 Barb. 358.) The only other question is, whether the facts admitted were sufficient to raise such a presumption that the bill was fraudulently put into circulation, so as to make it incumbent upon the plaintiff to prove that he gave value for it, and we submit, with confidence, that they were wholly insufficient. Finally, we insist that the defendant, having stopped the payment of the bill, is estopped from saying that he was prejudiced by its non-presentment for payment, if the proof of its presentment is to be deemed insufficient; and neither the drawer nor the endorser of a bill is discharged, when it clearly appears that he could have suffered no injury from the laches of the holder. (17 Wend. 94; 21 Wend. 375; 4 Hill. 263; 8 Wend. 168; Chitty on Bills, 355.)

D. Marvin, for defendant.

The verdict ought to be set aside, and the complaint be dismissed.

There was no legal proof, of a demand of the payment of the bill from the acceptor; the only proof was the notary's certificate, and this was only authenticated by his signature, which was not proved. By the law of this state, as by the common law, a notary's certificate is not evidence, unless authenticated by his official seal, and our statute, as to the mode of sealing such a certificate, does not apply to the acts of a foreign notary. (5 John. 239; 2 Hill, 227; 5 Denio, 110; 2 Duer, 278.) The certificate is, moreover, insufficient, on its face. It does not state that the notary had the bill in his possession, or that he took it with him when he made the demand of payment. (7 Barb. 143; *Mason v. Luke*, 4 How. U. S. R. 262.) But, supposing the proof of presentment and notice to be sufficient, the evidence clearly shows, that the bill was without consideration, that it was accepted for the sole accommodation of the defendant, and that it was lost, or fraudulently put into circulation. The plaintiff was, therefore, bound to prove, that he gave value for it, and took it without notice of these facts; and, no such proof having been given, he cannot be entitled to recover. (1 Duer, 309; 5 Binney, 469; 5 id. 412; 13 Mees. & Wel. 73; 3 En. L. & Eq. R. 379; 4 id. 531; 6 Wend. 615.)

BY THE COURT. DUER, J.—We think, that the certificate of the notary was properly admitted in evidence, and that, were it excluded, there is still sufficient evidence to entitle the plaintiff, in the first instance, to recover.

It was admitted, upon the argument, that the certificate was properly authenticated, according to the laws of Pennsylvania, and we strongly incline to the opinion, that, upon such a question, the law of the state in which payment of the bill is demanded, and the instrument of protest is executed, ought to govern our decision. (Story on Conflict, &c. § 360—on Bills, § 139, § 176; Chitty on Bills, pp. 193–506.) But, supposing this view to be erroneous, we are clearly of opinion, that an actual seal—not mere words or lines, in writing—stamped upon paper, of sufficient tenacity to receive and retain the impression, must be deemed a seal, in the technical sense, and within the strict definition, of the common law; and we are glad to find that the Supreme Court of this district made the same

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decision, in the case of *Curtis v. Leavitt*, where bonds of the North American Trust Company were held to be sealed instruments, although bearing upon their face no other seal than an impression, stamped upon the paper alone. (17 Barb. S. C. R. 318.)

The other objections, that were taken, to the admission of the certificate, were also groundless.

When the certificate of protest is properly authenticated, by the seal of the notary, no proof of his signature, or of his authority to act, is necessary, nor, as we believe, has ever been required. (*Halliday v. McDougall*, 2 Wend. 84; *Cape Fear Bank v. Stinemitz*, 1 Hill, 44; *Nichols v. Webb*, 8 Wheat. 381; 2 Green on Ev. p. 153.)

Nor can we say that the certificate is insufficient, on its face, as not showing that the notary had the bill in his possession when he went to demand its payment. When payment is, in fact, demanded, the protest must, undoubtedly, state that the bill was exhibited, when the demand was made; but, when it appears, from the protest, that the acceptor was absent, from the place where the demand was properly to be made, and had left no person there, of whom the demand could be made, it is sufficient to state that the notary went there, for the purpose of demanding payment; and, in these cases, such, we understand, is the usual form of the protest. The law will intend that he meant to make the demand in the proper form, by the exhibition of the bill, and, consequently, that the bill was then in his hands for that purpose. The cases to which we were referred of *Mason v. Luke*, (4 How. 262,) and the *Bank of Vergennes v. Cameron*, (7 Barb. 163,) are inapplicable, since, in each, there was an actual demand of payment, and the question was, whether it sufficiently appeared, upon the face of the protest, that the bill was exhibited when the demand was made.

But, while we are of opinion that the certificate, in its actual form, was sufficient evidence of a demand and refusal of payment, we are not to be understood as saying, that it was sufficient proof that due notice of the dishonor of the bill was given to the drawer, the defendant; but as this objection was not raised, either on the trial, or on the argument before us, we must regard it as waived. We have certainly no right to make it now a ground of decision.

But, as I have before intimated, had the defendant in this case relied solely on the insufficiency of the proof on the part of the plaintiff, we must still have held that the proof was sufficient to

warrant a recovery, even had no evidence whatever been given that payment of the bill had been demanded and refused, and notice of its dishonor been given to the defendant.

The bill, it is not only admitted, but insisted by the counsel for the defendant, was accepted for the sole accommodation of the defendant, who had no funds, nor expectation of funds in the hands of the drawer, either when it was drawn, or when it became due.

In such a case, the law is settled, that the drawer is not a surety, but the primary debtor, and is not discharged, either by the omission to demand acceptance or payment of the bill from the drawer, or to give him, the drawer, notice of its dishonor, when acceptance or payment is refused. He has no right to complain of an omission by which, in judgment of law, he could not have been prejudiced. (Chitty on bills, pp. 356, 362, 469, 490; Story on bills, §§ 278, 280, 327, 367, n. a., and the cases there cited.) The present case is even stronger than any of those to which Mr. Justice Story has referred, since it appears that the defendant himself stopped the payment of the bill, and therefore, knew that payment would not be made.

Hence, the only question that remains to be considered, is, whether the proof on the part of the defendant was such as to cast upon the plaintiff the burden of proving that he gave value for the bill when it was transferred to him. The presumption of law in all cases is, that the endorsee of a negotiable bill or note, is a holder for value, and it is a mistake to suppose—although the mistake is frequently made—that this presumption in favor of the holder is repelled merely by proof that the bill or note, as between the immediate parties, was without consideration, and was made, accepted, or endorsed by one, for the sole accommodation of the other. When no other proof is given, we hold it to be certain, that the holder is not bound to prove a valuable consideration. (*Charles v. Marsden*, 1 Taunt. 224; *Grant v. Ellicott*, 7 Wend. 229; *Com. Bank v. Norton*, 1 Hill, 501; *Harvey v. Towers*, 4 En. L. & Eq. R. 531; *Berry v. Alderman*, 24 id. 318.)

But the law is equally clear, that when it is proved that the bill or note, in respect to the defendant in the action, was fraudulently put into circulation or negotiated, the plaintiff is not entitled to recover without proof, that he parted with value when it

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came into his hands. We do not say, that he is also bound to prove, that he received the paper without notice of the fraud affecting its title, for when he has proved that he parted with value, the burden of charging him with notice is cast upon the defendant. (*Cullin v. Hanson*, 1 Duer, 309.) *309.*

It is upon the last question, whether the plaintiff, upon the whole evidence, was not bound to prove that he was a holder for value, that with some hesitation, we have come to a conclusion in favor of the defendant. We think, that upon the facts admitted on the trial, the question whether the bill was not fraudulently transferred by the agent of the defendant, Peet, to whom it was delivered, when the sum of \$500 was paid, upon his promise that he would return it to the defendant, ought to have been submitted to the jury, and, consequently, that to repel this defence, it was incumbent upon the plaintiff, to prove that he was a holder for value. Upon this ground, there must be a new trial, costs to abide event.

E. W. CLARK and others v. LOOMIS and Sisson.

When a note or bill is sold at its inception, at a discount exceeding the legal rate of interest, having no validity except that which such sale imparts, it is usurious and void.

This rule has been acted upon in this state so long and so uniformly, that the courts are not at liberty to treat it as an open question.

The fact, that it contains the words "value received," does not estop any party to it from showing that it was usurious at its inception.

The delivery to the parties, who discounted such a bill usuriously, of another bill made by the parties to the first one, and made and delivered merely as security for the payment of the first, and having no other consideration to support it, renders the second bill equally void as the first.

(Before Duer, Bosworth and Slosson, J.J.)
March, 1856.

THIS action came before the court, on a motion made by the plaintiffs for a new trial. It was tried before Chief Justice Oakley and a jury, on the 21st of November, 1855. After the evidence on both sides was closed, the Chief Justice dismissed the complaint, and the plaintiffs excepted to his decision. The case

presenting only questions of law, an order was made at the trial, that they be heard in the first instance at the General Term.

The complaint, first, alleged that Loomis, at the city of New York, on the 14th of July, 1851, drew a bill of that date, on Sisson, directed to him at Poughkeepsie, New York, payable to order of Loomis at the Bank of Poughkeepsie, on the 2d of August then next, without grace, for \$2,000, its acceptance by Sisson, and its endorsement by Loomis to J. J. Stewart & Co., and by the latter to the plaintiff, its nonpayment at maturity, and the acts necessary to charge the defendant Loomis as drawer and endorser.

The complaint then proceeded and concluded as follows:—

“And the plaintiffs further say, that afterwards, and on or about the 5th day of August, 1851, said defendants, or one of them, came to said plaintiffs and represented that they were not then able to pay said bill, but promised that if said plaintiffs would extend the time for thirty days, they would pay the same in full, to which proposition the plaintiffs readily acceded, and thereupon the defendants drew and accepted their certain other bill of exchange, for the said sum of \$2,000, dated said 5th day of August, 1851, and payable on the 1st day of September next ensuing, to the order of said defendant, Loomis, at said Bank of Poughkeepsie, and by him duly endorsed to said plaintiffs; which said last-mentioned bill was also in due form presented for payment at said bank, and payment thereof duly demanded; but said defendant Sisson then and there wholly failed and refused to pay the same, or any part thereof, whereof also the defendant Loomis had due notice.

“And the plaintiffs further say, that they are now the lawful owners and holders of said bills, and that the said defendants, and each one of them, are justly indebted to them thereupon in the sum of \$2,001.50, principal and expense of protest, together with interest thereupon from the said 4th day of September, A. D. 1851.

“Wherefore, the plaintiffs demand judgment for the said principal sum, expense of protest, interest, and the costs of this action.”

Loomis and Sisson for answer to the complaint, said, “That the bill of exchange therein mentioned, was drawn by Loomis, to raise money for his own benefit, and was accepted by Sisson solely for his consideration, and was placed in the hands of J. J. Stewart & Co., as agents of Loomis, to procure a loan upon it.

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That plaintiffs agreed to, and did loan upon it \$2,000, for which it was agreed they should be paid, and for which they were paid \$20 interest, for the loan of 2,000 for fifteen days. That the transfer of it to the plaintiffs, on this loan was its first inception."

On the trial, the plaintiffs produced the two bills of exchange, and proved that the interest on \$2,000, $\frac{1}{4}\%$ from the 4th day of September, 1851, to the time of the trial, was \$590 $\frac{1}{4}\%$ and rested.

The defendants proved that the bill of the 14th of July, 1851, was drawn by Loomis, to be negotiated for his own benefit, and was endorsed by Sisson, for his accommodation. That Mr. Loomis carried it to Mr. Canfield, one of the firm of J. J. Stewart & Co., and asked Canfield to try and sell it for him, who said he would do so. On, or about, the 19th of July, 1851, he sold it to the plaintiffs for \$20 less than its face, and before delivering it and receiving the money, endorsed it with his firm's name, that being required by the plaintiffs.

That the bill of the 5th of August, 1851, was left with the plaintiffs for collection, by Loomis, "and, if paid, the proceeds were to be applied to the first bill, the plaintiffs holding that."

The second bill was offered to the plaintiffs as a renewal of the first. They refused to receive the second draft other than for collection. They assigned, as a reason, that they had J. J. Stewart & Co. as endorsers of the first draft, and they would do nothing to lose their endorsement."

The bill of the 5th of August was also accepted by Sisson, solely for the accommodation of Loomis.

When Loomis took the bill of the 14th of July to Canfield, nothing was said by either to the other about its being business paper, and no statements were made by Canfield to J. J. Stewart & Co., nor did the latter inquire in relation to the character of the paper.

The two bills read as follows:

"\$2,000.

"NEW YORK, July 14th, 1851.

"On the 2d of August next, no grace, pay to the order of myself, at the Bank of Poughkeepsie, two thousand dollars, value received, and charge the same to account of

"FREEMAN LOOMIS.

"ISAAC SISSON, Esq., Poughkeepsie, N. Y."

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"\$2,000.

"NEW YORK, August 5th, 1851.

"On the first of September next, pay to the order of myself, at the Bank of Poughkeepsie, two thousand dollars, value received, and charge to the account of

"FREEMAN LOOMIS.

"ISAAC SISSON, Esq., Poughkeepsie, N. Y."

Each bill was endorsed by Loomis, and accepted, in due form, by Sisson.

At the conclusion of the evidence given, the plaintiff's counsel offered to prove that the current rate of exchange between New York and Poughkeepsie, on or about the 19th day of July, 1851, and also on or about the 5th day of August, 1851, was one half of one per cent. The court rejected the evidence, to which plaintiff's counsel excepted.

The court refused to allow the case to be submitted to the jury, to which the plaintiff's counsel excepted. The court thereupon dismissed the complaint as to both defendants, to which the plaintiff's counsel excepted.

The court then made an order, that the questions of law presented by the case, be heard, in the first instance, at the General Term, and that the entry of judgment, in the mean time, be suspended.

M. S. Bidwell, for plaintiffs, insisted, among other considerations, that the following rules and principles of legal and equitable jurisprudence and practice, are applicable to this case.

The burthen of proof was upon the defendants. If the proof of the facts stated in the answer was insufficient, or left the case doubtful, the plaintiffs were entitled to a verdict in their favor.

Where a party sets up the defence of usury, he is bound to allege the facts exactly according to the truth; or, in other words, he must prove the facts exactly as they are stated in his answer. (*State v. Willing*, 3 T. R. 538; *Curtis v. Masters*, 11 Paige's R. 16; *Vroom v. Ditmas*, 4 Paige's R. 526, 533; *N. Orl. G. & B. Co. v. Dery*, 8 Paige's R. 458; *Rowe v. Phillips*, 2 Sandf. Ch. Ca. 14.)

In this case the defendants have alleged in their answer, and in order to sustain their defence, are bound to prove that the plaintiffs agreed to, and did, loan two thousand dollars upon the first-mentioned bill of exchange, and receive for such loan for the space of fifteen days twenty dollars.

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Upon the facts in this case the plaintiffs were entitled to recover upon the first-mentioned bill of exchange.

1. If a bill of exchange is a valid instrument between the parties thereto, and not a mere *nudum pactum*, it may lawfully be sold for any sum; such sale will not be an usurious or unlawful transaction, although the bill may be sold at a greater deduction than the legal interest from the face of such bill. (*Rice v. Mather*, 8 Wend. R. 62; *Cameron v. Chappel*, 24 Wend. R. 94.)

2. When a bill of exchange is disposed of under a representation that it has been accepted for value received, the defence of usury cannot be sustained to an action by the holder to recover the amount of the bill.

There is no ground for charging a party with usury if he makes the contract and advances the money in ignorance of the facts which constitute usury. (*Holmes v. Williams*, 10 Paige's R. 326, 333; *Aldrich v. Reynolds*, 1 Barb. Ch. R. 43, 279; *Jackson D. Walsh v. Colden*, 4 Cow. R. 266; *Ramsey v. Clark*, 4 Humph. R. 244; *Taylor v. Bruce*, 1 Virginia, Gilmer's, R. 42; *Whitworth v. Adams*, 5 Rand. R. 333; *Law v. Sutherland*, 5 Gratt. R. 357, 360, 361; *Smith v. Beach*, 3 Day's R. 268; *Middletown Bank v. Jerome*, 18 Conn. R. 448; *Murray v. Harding*, 3 Wils. R. 395, 396; *Davison v. Franklin*, 1 B. & Ad. R. 142.)

3. If a party, by his silence, allows another to act upon a mistake of facts, he is thereby estopped from setting up those facts afterwards to the prejudice of the person who has been misled. His silence binds him upon the same principles as if he had by express misrepresentation misled the other party. He is estopped in both cases upon equitable principles from denying the truth of the facts upon which the other had been induced, by such misrepresentations or silence, to rely. (1 Story's Eq. Jur., sec. 385; *Picard v. Sears*, 6 Adol. & El. 474; *Town v. Needham*, 3 Paige's R. 555; *Watson's Executors v. McLaren*, 19 Wend. R. 563, 564; 1 Cow. & Hill's Notes, 204.)

4. There may be a misrepresentation by actions as well as by words. (*Chisholm v. Gadsden*, 1 Strobb. Law. Rep. 210.)

5. In this case, there was a legal presumption raised by the mere fact of acceptance, that the acceptor had in his hands funds of the drawer, to the amount of the bill, and, of course, third parties, unless informed to the contrary, had a right to presume that such

was the fact. (*Griffith v. Beed*, 21 Wend. R. 504, 505; *Suydam v. Westfall*, 4 Hill R. 216.)

6. The defendants had joined in a written representation that Sisson had accepted the bill for value received. This representation was shown to the plaintiffs at the time when they purchased the bill. It was not the less to be relied upon, because it was contained in the bill itself, than it would have been if it had been in a letter or a certificate. (*Mandeville v. Welch*, 5 Wheat. R. 277.) On the contrary, it was more credible and less suspicious, than if it had been formally stated in such certificate.

7. There was nothing in the circumstances in the transaction to involve suspicion. It was taken by them in the usual course of business. From one who had frequently sold notes and bills to them. It was brought to them as a thing for sale. They were not asked to make a loan; did not intend to make a loan; did not suppose they were making a loan. It had the appearance of business paper; it bore a prior date; was drawn on a different place; payable in a short time, and without grace. It was endorsed by J. J. Stewart & Co. The contract of Canfield, under the circumstances, amounted to a virtual representation, that the bill was a valid subject of sale.

The evidence offered, to prove the rate of exchange between the city of New York and Poughkeepsie, was pertinent and admissible.

1. It is not usurious, for a person, upon a loan of money, to receive, in addition to the lawful interest, the difference of exchange between the place of loan and the place of payment. (*Merritt v. Benton*, 10 Wend. R. 116; *Cayuga Co. Bk. v. Hunt*, 2 Hill, 635; *Ontario Bank v. Schermerhorn*, 10 Paige's R. 109; *Buckingham v. McLean*, 13 How. U. S. R. 151.)

If it be alleged, that the charge for such exchange is a mere pretext, to cover usury, the court cannot determine the question, but must leave it to the jury. (*Andrews v. Pond*, 13 Pet. R. 65-76; *Carstairs v. Stein*, 4 Mau. & Sel. R. 192, 202.)

2. The defendants ought, in equity and good conscience, to refund to the plaintiffs the money, which they received from them, and the interest thereon. (*Early v. Mahon*, 19 J. R. 149; *Rogers v. Rathbun*, 1 J. C. R. 367; *Tupper v. Powell*, 1 J. C. R. 439; *Beach v. Fulton Bank*, 3 Wend. R. 573; *Livingston v. Harris*, 11 Wend. R. 330; 1 Story's Eq. Jur. sec. 301.)

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3. The defence of usury, was a personal privilege of the defendant.

They could waive it, if they saw fit to do so, and, in such a case, neither the court nor any third party could object to their doing so. (*Stoney v. Am. Life Ins. Co.*, 11 Paige R. 635; *Churchill v. Hunt*, 3 Denio R. 325; *Spangler v. Snapp*, 5 Leigh. B. 478; *Littel v. Hord*, Hardin's R. 81, 82; *Campbell v. Johnston*, 4 Dana R. 182.)

4. Where there has been an usurious loan, a new contract between the parties, for the repayment of the sum actually advanced, and the lawful interest thereon, is valid and binding: it is a promise, founded on a sufficient consideration. (*Early v. Mahon*, 19 J. R. 149.)

5. The evidence, thus offered and rejected, was sufficient to have established the validity of the second bill of exchange, if the first were void for usury, as such second bill was for less than the money received by the defendants, and lawful interest thereon, to the time of payment, added to such exchange.

Amount of bill,	\$2,000 00
Less discount of :	20 00
	<hr/>
	\$1,980 00
Int. on this amt. from 19 July to 4 Sept., 1 mo. 16 da.,	17 71
Exchange between New York and Poughkeepsie, . .	10 00
	<hr/>
	\$2,007 71

The case ought to have been submitted to the jury.

The judgment should be set aside with costs.

John Van Buren and *A. L. Pinney*, for defendants, made and argued the following points:—

I. The draft in question was drawn by Loomis, and accepted by Sisson, for the accommodation of Loomis in obtaining a loan. It had no legal inception until passed to plaintiffs. It was not, then, the subject of a sale, but the instrument of a loan, and, having been received at an usurious rate of interest, was void in their hands.

II. There was no representations made, to the plaintiffs, by the

defendants, or their agent, that would authorize a jury to find they were estopped from setting up the defence of usury.

III. The second bill did not belong to plaintiffs; but, if it did, it is equally with the first infected with usury.

IV. The evidence offered, as to the current rate of exchange, was wholly irrelevant.

1. There was no pretence that it entered into the contract of the parties: the evidence shows that it did not.

2. Even deducting this exchange, the contract is usurious.

V. There was no question of fact to submit to the jury, and no evidence, on which a verdict for plaintiffs, if found, could be upheld.

VI. The motion for a new trial should be denied, with costs.

BY THE COURT. BOSWORTH, J.—The bill, of the 14th of July, 1851, had no legal inception, before it was transferred to the plaintiffs.

The purchase, or a discount of it, on a deduction, from its amount, of a sum, which exceeded the legal interest on the money advanced, for the time the bill had to run, made the transaction usurious, and the bill void in the plaintiffs' hands. (*Arby v. Rapelye and others*, 1 Hill, 9; *Williams v. Storms*, 2d Duer, 52; *Dowe v. Schult, et al.*, 2 Denio, 621; *Powell v. Waters*, 8 Cowen, 669.) We consider this rule to have been uniformly acted upon, judicially, for too long a period, to leave us at liberty to treat it as an open question.

Interest, to the maturity of the bill, on the sum paid for it, and the amount of exchange, at one half of one per cent., and such sums, added together, are less, by some dollars, than the face of the bill. There can be no pretence, that it was the understanding, or intent of the parties, that only legal interest, and exchange, at the current rate, should be deducted, and that too much discount was taken, by an error in computation, and unintentionally.

The bill, of the 5th of August, 1851, was delivered to, and received by the plaintiffs, as collateral to that of the 14th of July. The plaintiffs refused to receive the former, except for collection. If paid, the proceeds were to be applied to the latter bill.

The bill of the 5th of August was not accepted, as a substitute, for that of the 14th of July. Having no consideration, to support it, except such as arises from forbearing the payment of the bill

Freeman v. Orser.

of the 14th of July for thirty days, and having been given to the plaintiffs, the parties who discounted that usuriously, to secure the payment of that bill, it is also void, on the plaintiffs' hands. (*Truthill v. Davis*, 20 J. R. 285; *Dowe v. Schult*, 2d Denio, 621; *Mitchell v. Ostrem*, 2 Hill, 520.)

The fact that the bill contains the words, "value received," does not make the mere offering of such a bill for sale or discount, a representation, by Sisson or Loomis, that it was actually accepted for value, received by the acceptor, which will preclude, or estop, either of them from proving the contrary to be true, as against a party who discounted it usuriously, without any inquiry into the consideration on which it was founded. It is not essential that a bill or note should contain such words, but such has been their common form from their earliest use. Treating such words as a representation that the actual truth is such as they import, and giving to them the effect of an estoppel, would virtually operate as a repeal of the statute against usury.

If the possession of the bill by Canfield, and the endorsement of his firm's name upon it, was evidence that Canfield's firm then owned it, there could be no pretence that the plaintiffs supposed him authorized, as the agent of Loomis or Sisson, to make any representation concerning its business character, nor could such a representation, if made by him, affect them. (*Dowe v. Schult, et al.*, 2 Denio, 621.) But he did not, in fact, make any such representation.

The plaintiffs are not entitled to recover on either note. The complaint was properly dismissed, and the defendants are entitled to judgment.

REBECCA FREEMAN, by her next friend, v. JOHN ORSER, sheriff.

Before the acts of 1848 and 1849, "For the better protection of the property of married women," a married woman, even when her property was settled to her separate use, could not carry on any trade or business separately from her husband, and hold the earnings of it, secure from the claims of his creditors, unless by his assent and agreement, given either before marriage, and in consideration of it, or, subsequently, upon a new and valuable consideration. Although the acts of 1848-9 have dispensed with the necessity of trustees to pro-

tect the wife's separate property, whether owned by her at the time of the marriage, or subsequently acquired, against the claims of her husband's creditors, they have not given to her any right to deal with such property in the way of trade, as a *feme sole*, without the agreement or assent of her husband.

The acts in question do not contemplate the case of a married woman carrying on trade in her own name and right as a *feme sole*. Had the legislature intended to confer this right, language expressing that intention would have been used.

Such an intention cannot be implied, unless the implication be necessary, since the statutes are an alteration of the common law, in derogation of the marital rights of the husband. That the implication is not necessary is certain, since, without it, full effect may be given to every word that the statutes contain.

It is a necessary conclusion, that a married woman having separate property, has no right to invest it in a trade carried on by her in her own name, so as to hold the accretions and profits resulting from the business protected from the claims and interference of the creditors of the husband.

To enable her to do this, the assent of the husband, founded on a valuable consideration, is just as indispensable as before the acts of 1848 and 1849 were passed.

The time, services, talents, and industry of the wife belong to the husband, and are valuable in themselves. He has, therefore, as against his creditors, no more right to part with them, without a valuable consideration, than to make a voluntary settlement of any other property belonging to him in fraud of his creditors.

There being no evidence, in the case before the court, of any valid assent by the husband, to a millinery trade carried on by the wife, and it appearing that the earnings and profits, as well as her separate capital, were invested in the stock on hand, and there being no means by which they could be discriminated,

Held, that the whole was rightfully levied on, under an execution against the property of the husband.

Judgment for defendant, with costs.

(Before Dura, Bosworth and Skosson, J.J.)

March, 1856.

THIS was an action against the defendant as sheriff, for the delivery of a stock of millinery, consisting of hats, bonnets, ribbons, &c., which the complaint alleged was the separate property of the plaintiff, and that the defendant had wrongfully seized and carried away.

The defence was, that the goods were rightfully levied and seized under an execution against the property of Samuel J. Freeman, the husband of the plaintiff, and that they were in fact his property.

The cause was tried before Oakley, Chief Justice, and a jury in November, 1855, and a verdict rendered for the plaintiff, subject to the opinion of the court at General Term, upon the questions of law reserved and exceptions taken, on the trial, and with

liberty to the court to dismiss the complaint, order a new trial, or a judgment to be entered for the defendant. The cause came before the court upon a case containing the proceedings and evidence upon the trial.

All the facts that were deemed material, and upon which the questions of law to be determined arose, are fully stated in the opinion of the court.

H. Morrison, in moving for judgment for the plaintiff, relied upon the provisions of the acts relative to the rights and property of married women, as showing conclusively, that the goods seized by the defendant were the separate property of the plaintiff, and therefore not subject to the claims of the creditors of her husband. (Laws of 1848, ch. 200; Laws of 1849, ch. 375.)

A. J. Vanderpool, for the defendants, contended that the statutes relied on, had not conferred upon a married woman the power to carry on trade and merchandise as a *feme sole*, nor had they deprived the husband of his common law right to the proceeds of the skill and labor of the wife. He cited 20 Penn. R. 308; 3 Law Reg. 229; 2 Car. & Pay. 38; 6 Howard, Pr. R. 105; 10 *id.* 109, and claimed judgment for the defendant.

BY THE COURT. SLOSSON, J.—I shall first state what we deem to be the material facts of the case, and proceed to the questions of law to which they have given rise. The plaintiff, a married woman, brings this action, to recover certain millinery ware, which the sheriff, on the 23d of November, 1854, levied upon, in a store in Division street, under an execution, upon a judgment against her husband, and which she claims to be her own separate property, "being the proceeds of her own separate, and individual funds and money."

The judgment against the husband was docketed, 11th February, 1854, for \$263.04.

The defendant insists that the goods levied upon were the property of the husband, or that he had a leviable interest therein. The plaintiff was married in February, 1853. The principal witness for the plaintiff was her own mother.

On the 1st of May, 1854, the mother let the store to her daughter, the plaintiff, for one year, at a rent of \$500, "to be occupied as

a millinery store for her own family." After taking the store, she fitted it up as a milliner's shop. She expended, in the purchase of stock, the moneys which belonged to her before the marriage, some \$395 in amount. Of this amount, \$50 had been given to her, by her mother, in 1852, and deposited to her credit in bank before her marriage: the balance of the moneys consisted of her earnings, in her mother's employment, at five dollars per week, until her marriage, and was deposited in the bank, to her credit, November, 1853.

On the 24th of March, 1854, she drew out \$200, and the entire balance in April following, for the purpose of purchasing her stock. The business of the store was carried on in her own name.

The mother says, that "the goods in the store, up to the time of the execution, were the proceeds of her own money, and the success of her business." She employed five or six hands. The value of the property levied on was \$488.50.

On the 24th of May, 1854, she effected an insurance on her stock, in her own name, for \$1,000, under which policy a small loss was paid, in 1855, to her husband, who receipted for it in her name.

The husband had been in the clothing business, but had failed, before his marriage with the plaintiff.

He sometimes assisted in the store, and made sales to a small extent. He also made purchases, at times, of goods for the store, but not to any great extent, and he attended the store when his wife was absent or sick. The plaintiff and her husband lived in the house in which the business was carried on.

The plaintiff relies on the provisions of the act of 1848-9, "for the more effectual protection of the property of married women."

Upon these facts, the main question is, whether a married woman, having, at the time of her marriage, moneys of her own, which, by the operation of the acts of 1848-9, are, without the intervention of trustees, secured to her own separate use, free from liability for the debts of her husband, may, by virtue of those acts, invest her moneys in trade, carry it on in her own name, and hold the stock, with its accumulations, and the earnings and profits of the business, exempt from the claims of her husband's creditors?

The right and ability of a married woman to carry on a trade, separate from her husband, and to hold the earnings of it, secure from the claims of his creditors, always depended upon his assent

and agreement, either given before marriage, and in consideration of it, or given subsequently to it, and upon a new and valuable consideration.

Where it was given before the marriage, it was given through the medium of an ante-nuptial contract, with trustees, to hold the legal title to the property or fund. The marriage constituted a valuable consideration, for the husband's agreement. The trust was good in equity, and the title of the trustees good at law. The wife acted, in carrying on the trade, on the theory of being an agent of the trustees, who were entitled to the property, and the profits of the business, but, in trust, for her use.

If the agreement was entered into after marriage, it required a new and valuable consideration to support it, and trustees were also necessary.

In equity, in which court the husband would be considered as trustee for the wife, a more liberal rule prevailed, and an ante-nuptial agreement in writing, by which the wife was permitted to carry on a trade on her separate account, was good without the intervention of trustees, and so after marriage, his mere permission or consent was enough to authorize her to carry on the trade, but in the latter case, unless such permission was founded upon a valuable consideration, his creditors would be let in to assert their claims to the stock in trade. (Story's Eq. Juris. 8, 1385, 6, 7; Roper on Husband and Wife, ch. 18, § 4; Id. ch. 8, § 2; *Jarman v. Worlston*, 3 T. R. 618; *Harelington v. Gill*, 3 T. R. 620, note; Fonblanque's Eq. 1 ch. 2, § 6, n. a.)

But the wife, whether trading in pursuance of an ante-nuptial agreement, or of an agreement entered into with the husband after marriage, could not, in law, bind herself by obligations created in her own name. Such obligations would be void, and if she received securities in her own name, as for example, a promissory note, payable to her own order, such security became at once the husband's property, and she could not, by endorsement, divest him of the title, so as to enable the endorsee to maintain an action on it. (Roper, ch. 18, § 4, p. 171, 2; *Barlow v. Bishop*, 1 East. 432.)

In equity, the rule would probably be different, as that court, acting on the principle of her power to act as a *feme sole* in respect to her separate property, would establish the debt against herself in respect to her separate estate. (Roper, ch. 18, § 4, p. 172.)

Thus it will be seen, that the right of the wife to trade on her own account, required absolutely the assent of the husband; his marital rights in her time, company, and services could not be impaired without his agreement or acquiescence, and so far as he was himself concerned, such agreement or assent though partly voluntary, would be binding, but as against his creditors, a valuable consideration to support the assent, was necessary, and at law, the intervention of trustees to hold the legal title, and this whether the assent was given in an ante-nuptial contract, or an agreement after marriage.

Such was the law before the statutes in question were passed, (1848-9,) and such, apart from those statutes, is undoubtedly still the law.

Have these statutes created any difference or change, or introduced any new rule in relation to this subject?

They have undoubtedly dispensed with the necessity of trustees to protect the wife's property from the husband and his creditors, whether owned by her at the time of her marriage, or subsequently acquired by her by inheritance, gift, grant, devise, or bequest, from any person other than her husband's, but this of itself gives her no right to deal with such property in the way of trade, as a *feme sole*, without the husband's assent. There is nothing in the language of the statute, from which such a right can be inferred. The statute equally protects the "rents, issues, and profits" of the property, as the property or fund itself out of which they spring, yet this language does not certainly imply profits to be made in a trade; the statute refers in these words to such profits and issues only as naturally flow from the fund, such as rents, interest, and probably the savings from both, which were always protected where the wife had separate property, independently of any statute. (Clancy, ch. 3.)

A critical examination of the language of the statute will show, that the great object to be secured by it, was the protection of the property of the wife, without the intervention of trustees, from the marital rights of the husband, and through him of his creditors, and also to give to her the freedom and capacity of a *feme sole*, for the purpose of alienating and devising the same, neither of which was she legally competent to do before the statute, but that beyond this, the statute never intended to go, nor designed

further to interfere with the common law rights of the husband in the personal property of the wife, than to suspend in her favor the operation of the rule which made such property his of right, and deprived her at law of any separate ownership in it, or power of disposition over it. The statute seems never to have contemplated the case of a wife trading in her own right and name as a single woman upon the property it secured to her, and is wholly silent on the subject. Had the legislature intended to confer such a right, other, or additional language, clearly expressing such intention, would undoubtedly have been used in the statute.

Another serious difficulty exists in the way of giving such a construction to these statutes, and that is her incapacity in law to make contracts in her own name, which would be binding on herself. It has already been noticed, that even where she carried on such a business under an ante-nuptial or post-nuptial agreement, she acted in it as the agent of her trustees, and was incapable, at law, of making contracts in her own name which would bind her. The statutes in question, have certainly not in terms given her any additional power or authority in this respect. Have they done it by implication? It is impossible to say this. Every requirement of the statute is fully answered without giving to the wife the slightest power to create obligations binding on herself personally.

In *Switzer v. Valentine*, (10 Howard's Rep. 109,*) a case arising in this court, a strong doubt was expressed by the court, though the case did not call for a decision on the point, whether these statutes authorized a married woman, having separate property, to become a general trader, and make valid contracts in respect to such trade.

In the case of *Avery & Moody v. Doane*, (reported in 3 Am. Law Reg. p. 229,) which arose in Wisconsin, and was tried in the United States District Court for that district, the effect of a law existing in that state, and identical, in all respects, with our own, from which it was copied, was fully discussed, and the court held, that the protection of the statute extended only to the separate property itself, and that she acquired, under it, no independent authority to deal, in trade, on her own account, and that she was still incapable of binding herself by contract, and could not sue or be sued, in her own name, in transactions of trade.

* Now reported in 4 Duer, 66.

But, if it should be granted that the statute did confer this power on married women, it, certainly, could not be contended that it intended to extend its protection, beyond the identical property which constituted the separate estate of the wife, thus embarked in business, and the accretions, or profits, strictly resulting or flowing from it. If, therefore, the capital invested should be more in amount than that of her own private funds, how is the identity of the two funds, or of the subsequent profits or accretions, to be determined?

The present case, is an instance of this difficulty. The original stock, undoubtedly, exceeded the amount of the separate moneys invested in it, as we find that, in May, she effected an insurance on it to the amount of \$1,000, which must be assumed to have been, at least, its value. It is impossible to say what particular portion of this stock was purchased with any particular moneys, and equally impossible to say whether any portion of the stock actually levied upon, six months afterwards, was, in fact, purchased with any part of the moneys originally invested, by her, in the business, or the profits of those moneys.

In *Gamber v. Gamber*, (18 Penn. R. 363,) the court held, that a married woman, claiming property, as her own, against an insolvent husband's creditors, under the marriage act existing in that state, must make out her title clearly. She must show that she purchased it—when the purchase was after the marriage—with funds not furnished by her husband.

A law, substantially like our own, was enacted in Pennsylvania, in 1848.

In the case of *Keeney v. Gord*, (21 Penn. Rep. 349,) arising under that act, the court held, that the fact, that the property was purchased by the wife, amounted to nothing, unless accompanied by clear and full proof that she paid for it with her own separate funds.

We are clearly of opinion, that these statutes do not confer upon a married woman, having separate property, the right to deal with it in the way of trade, to be conducted in her own name, so as to hold it, and its accretions and profits, made in the course of the business, protected from the claims and interference of the creditors of the husband.

I regard the legal condition of the wife, in regard to her separate

property, under these statutes, as precisely what it was at law under an ante-nuptial settlement with trustees. It is not better protected, and is clothed with no higher rights; and if, under such a settlement, a wife could not have become a sole trader, without a provision to that effect in the deed of settlement, neither can she now, by the mere operation of the statute.

To enable a married woman to carry on a trade, in her own name, in respect to her separate property, so as to protect it, and the earnings of her business, from the claims of her husband's creditors, requires, now, as it did formerly, the assent of the husband, founded on a valuable consideration.

The reason, why a valuable consideration is necessary, is, that the services, time, talents, and industry of the wife, are, in themselves, valuable, and the husband, as against his creditors, has no more right to part with them, voluntarily, than he has to make a voluntary settlement of property on his wife, in fraud of his creditors.

In the present case, there is no pretence of any ante-nuptial assent, founded on the consideration of the marriage, that the wife should carry on a separate trade, on her own moneys. Her right to do this, if it exists at all, must depend upon the assent of the husband after the marriage; but, though this may be assumed to have been fully proved, by his acts and acquiescences, it lacks, as against his creditors, the vital requisite of a valuable consideration to support it: the husband has gained nothing, and the wife has lost nothing, by reason of this acquiescence.

There is another circumstance, in the present case, which makes it still clearer against the plaintiff's right of recovery. Both husband and wife were living together, in the house in which the business was carried on, and apparently out of the business itself. He sometimes assisted in carrying it on, and occasionally made purchases and sales, and attended to the store in his wife's absence. Under such circumstances, and in the absence of any evidence of valuable consideration, for his assent to her trading in her own right, she can be regarded in no other light than as his agent, in conducting the business.

He would be liable on her contracts, and the merchandise purchased would be deemed, in law, his own.

Judgment must be for the defendant, with costs.

CORNELIUS V. ANDERSON and another v. RICHARD BUSTEED.

An endorser of negotiable paper is not an assignor within the meaning of the Code. His examination as a witness does not render the party against whom he is examined a competent witness under § 899 of the Code. But where the adverse party has been examined as a witness, and is nevertheless defeated on the trial, the objection that he was improperly admitted, cannot be raised by the prevailing party, although made on the trial, on the argument of a motion for a new trial, as an answer to such motion.

Having been admitted as a witness, although improperly, if it appear that any material question put to him, that ought to have been allowed, was overruled, a new trial must be granted, since the court cannot say, that had the evidence thus excluded been received, the same verdict or judgment would have been rendered.

An endorsee of a dishonored check, who has knowledge of the fact, takes it subject to every defence legal or equitable that could have been made against his endorser.

(Before DUES, BOSWORTH and SLOSSON, J. J.)

March, 1856.

THIS was an action by the plaintiffs as endorsees of a bank check, payment of which had been refused, against the defendant, as drawer. The check, as set forth in the complaint, was dated on the 26th of February, 1855, drawn on the Bull's Head Bank, for the sum of \$131, payable to P. McAleer or order, and endorsed by him to the plaintiffs.

The answer admitted the making of the check, but denied that it was given for value, and denied the title of the plaintiffs, and set up as a counter claim, that the payee, McAleer, was indebted to the defendant for professional services in a larger sum than the amount of the check, and averred, that the plaintiffs took the check with knowledge of this fact, and a month after its date. The cause was referred to R. E. Mount, Jr., as sole referee, who reported that the plaintiffs were entitled to recover \$138.69, besides costs. Judgment for this sum with costs was accordingly entered, from which the defendant appealed, and the cause was heard upon a case settled by the referee, and containing the proceedings upon the trial before him.

It is not deemed necessary to state any other of the proceedings

upon the trial than those, which have an immediate bearing upon the questions decided by the court.

It was proved that the check was given by the defendant to McAleer, the payee, on the 28th of February, for the amount that McAleer alleged was then due to him, and that at the time it was given, the defendant insisted that McAleer was indebted to him in the sum of \$80 for professional service as attorney and counsel. That the defendant stopped the payment of the check immediately after he gave it, and that the bank accordingly refused to pay it when presented. That McAleer, about a week thereafter, endorsed and delivered the check to Anderson, one of the plaintiffs, and told him that payment had been stopped and refused. The check was endorsed to the plaintiffs on account of a debt of \$200 then owing to them by McAleer.

McAleer was examined as a witness on behalf of the plaintiffs, and stated what had passed between him and the defendant when the check was given, and the defendant then offered himself as a witness on his own behalf to the same matters. The counsel for the plaintiffs objected to his admission. The objection was overruled and the counsel excepted.

The defendant then, being sworn, testified, among other matters, that, on the morning that he gave the check, McAleer wished him to deduct the amount of his bill against him for professional services, and that this amount was \$80. He was then asked "whether that bill had not been previously adjusted between McAleer and himself?" The counsel for the plaintiff objected to the question. The referee sustained the objection, and the counsel for the defendant excepted to the decision. Other questions, substantially of the same import, and tending to prove the set-off claimed by the defendant, were afterwards put to him, which, in like manner, were overruled by the referee, and exceptions taken to his decisions.

M. M. Ely, for the defendant, insisted that the report of the referee was contrary to law and evidence, and ought to be set aside, and the judgment thereon reversed; and that especially the referee had erred in overruling the questions put to the defendant, the answers to which would have shown that he was clearly entitled to the set-off that he claimed.

Pomeroy, for the plaintiff, argued at length that the report of the referee was sustained by the evidence, and unobjectionable in law. He contended that the questions put to the defendant were properly overruled; that the referee had erred in admitting the defendant to testify at all, and that his whole testimony ought, therefore, to be stricken from the case. He cited *Hicks v. Worth*, 10 How. Pr. R. 555, and *Watson v. Bailey*, 2 Duer, 509.

BY THE COURT. SLOSSON, J.—The defendant was improperly admitted as a witness, as McAleer was not an assignor, within the meaning of section 399 of the Code; but of this the plaintiff cannot now complain. If the plaintiff's objection had prevailed on the trial the defendant might have supplied, by other evidence, what he has now established by his own; besides, the plaintiff has obtained a judgment.

The defendant being a witness, however, the question put to him, whether the bill between himself and McAleer had been previously adjusted, was improperly overruled on plaintiff's objection. It related substantially to the same matter to which McAleer had been examined, and went directly to establish the amount of his set-off or claim against McAleer, which the evidence had left somewhat doubtful. Had he established this, it would, under the evidence, have been good as a set-off, (not counter claim) against the plaintiffs, who took the check some time after it was drawn, and with knowledge of its dishonor.

We cannot say that had this evidence not been excluded the set-off claimed would not have been allowed by the referee.

There must be a new trial, costs to abide the event, and the order of reference must be discharged.

JASPER W. HUGHES, CHARLES WOOD and STEPHEN TRAPIE
v. ISAAC ALEXANDER.

A debtor, in failing circumstances, obtained from his creditors a discharge in a composition deed, upon paying twenty-five per cent of the claims, in endorsed promissory notes. The plaintiffs made it a condition that they should be ultimately paid the remaining seventy-five per cent. A bill of goods was subsequently purchased by the defendant, of the plaintiffs, and for the aggregate amount of such bill, and the balance of the old debt, two notes were given. Each note included part of such old balance. One, however, at 90 days, was for the price of the goods, and \$21.60 of such balance; the other was exclusively for it.

An action was brought upon the 90-day note, and judgment taken for want of an answer. The complaint there was simply upon the note in the usual form.

Held, that supposing the defence would have been available in the former action, yet the judgment there does not preclude the defendant from setting it up here.

Held, that the condition attached to the agreement for the composition, was against the policy of the law, and void.

(Before HOFFMAN, SLOSSON and WOODRUFF, J.J.)

April, 1856.

CASE made upon a verdict for the plaintiff, taken subject to the opinion of the court at General Term, the cause to be heard there in the first instance, and judgment in the mean time to be suspended. The facts of the case, and the course upon the trial, are stated in the opinion of the court.

— *Bradley*, for the plaintiffs.

— *Matthews*, for the defendant.

BY THE COURT. HOFFMAN, J.—The complaint is simply upon a promissory note, dated the 13th of March, 1851, at sixty days, given by the defendant to the firm of Wood & Hughes, for \$109.50, and alleged to be owned and held by the plaintiffs. They demand judgment for the amount, with interest from the 15th of May, 1851, and costs of the action.

The defence is, that, in the month of July, 1850, the defendant became insolvent, and effected a compromise with his creditors,

including said Wood & Hughes, by their receiving twenty-five per cent upon their claims, in full discharge thereof. Such amount was adjusted by a note of the defendant, endorsed by Beruheimer & Swartz, which was paid at maturity; that the said Wood & Hughes refused to accept such accord, and satisfaction, and to execute such compromise agreement, until the defendant promised to pay the remaining seventy-five per cent of their claim. That to induce Wood & Hughes to sign, with the other creditors, such promise was made. The compromise note for the twenty-five per cent was given, and afterwards paid, and that such promise was made secretly, and without the knowledge of the other creditors who signed the compromise instrument. That in March, 1851, he bought of the plaintiffs a bill of goods, amounting to \$94, on a credit of ninety days. That Wood & Hughes then insisted on payment of the old balance, and accordingly he made his two promissory notes for \$109.50 each, the one for said purchase of \$94, and \$15, part of the old balance and interest thereon, payable at ninety days from said March 13th, 1851; and the other for the remainder of the old balance and interest thereon, and for no other consideration, payable at sixty days, both to the order of said Wood & Hughes, and delivered both of such notes to them.

It is proven that the note of ninety days, due in June, was sued upon in August, 1851; that judgment was recovered upon it for want of an answer, and the amount was subsequently paid by the defendant. The note now in question, at sixty days, was not sued upon until January, 1855.

The record of the judgment in the Supreme Court, in favor of the plaintiffs Hughes & Wood, was read in evidence.

The complaint is in the usual form upon a promissory note, dated the 13th of March, 1851, for \$109.50 payable in ninety days, with the averment of ownership and indebtedness, and demand for judgment.

Upon the usual affidavit of personal service of the summons and complaint, and no answer being received, a judgment was entered, and filed, the 4th of September, 1851.

The composition deed was signed by twenty-five different creditors, in various amounts, and states the acceptance of twenty-five per cent, payable in defendant's note, at three months, with a good endorser, in full satisfaction and discharge of all claims.

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It was proven that when the composition deed was tendered to Wood & Hughes, for their signature, both being present, they refused to sign it, unless the defendant would agree to pay the balance. The defendant then agreed to pay it, and one of the firm signed the instrument.

The jury, upon the question being submitted to them, have found, that the plaintiffs, at the time of signing the compromise agreement, exacted the promise to pay as a condition of signing the same.

In relation to the manner of making up of the two notes, each for \$109.50, the one at sixty and the other at ninety days, and the consideration which entered into them, the evidence is this:—

The extracts from the plaintiff's books, produced by the defendant, show that the original debt (upon a note) was \$164.20. These entries may be thus presented:—

1851.

March 18th.	Balance of note July 16th, 1850,	
	after deducting 25 per cent com-	
	promise,	\$123 07
" "	Interest to date,	8 03
		<hr/> \$131 10
" "	Bill of goods of October, 150, . .	21 54
" "	Do. of March, 1851,	66 36
		<hr/> 87 90
		<hr/> \$219 00
" "	By notes at 60 days,	\$109 50
" "	" " 90 "	109 50
		<hr/> \$219 00
	131 10—109 50—\$21 60	<hr/>

A witness in the employ of the defendant, in March, 1851, identifies the bill of parcels of the silver cups, and recollects the purchase, and when the two notes were given. He states that the ninety-day note was given for silver cups in the bill; the sixty-day note was given for the old balance.

After the testimony was closed, the defendant renewed a motion to dismiss the complaint, which was refused. The Judge then remarked, that there was but a single question disputed, and, upon

that being answered, the case would be better disposed of, as matter of law, at the General Term.

He, therefore, submitted to the jury the question whether the plaintiffs, at the time of signing the compromise agreement, exacted the promise to pay as a condition of signing the same? The jury were directed to say "Yes" or "No," and answered "Yes." The Judge, thereupon, directed a verdict for the plaintiffs, for \$140.64 to be entered, subject to the opinion of the court at General Term, upon a case to be made; the cause to be heard there in the first instance, and judgment suspended; to which direction the counsel for the defendant excepted, and requested the Judge to direct a verdict for the defendant, which was refused, and the refusal excepted to. Whereupon the case was made, with liberty to turn the same into a special verdict or bill of exceptions.

I. The first question is, as to the effect of the judgment in the Supreme Court by default, upon the note at ninety days. It is insisted that as the defendant could have defeated a recovery upon that note, upon the same grounds as that on which he defends the present action, he is precluded from now setting it up.

A rule which bears upon this question is found in the cases of *Birkhead v. Brown*, in this court, (5 Sandf. S. Ct. Rep. 145; *Davis v. Talcott*, 14 Barbour S. Ct. Rep. 619; *Campbell v. Butts*, 3 Comstock, 173; and *Doty v. Brown*, 4 Comstock, 71.) In the former Mr. Justice Duer, after examining the authorities, says:—

"As between parties and privies the rule is, that a judgment is conclusive as to every question upon which the right of the plaintiff to recover, or the validity of a defence in another suit, is found to depend, and upon the determination of which, it appears from the record, or is shown by extrinsic proof, that the judgment was, in reality, founded."

In *Davis v. Talcott*, Justice Taggart states several leading cases, and remarks:—

"In the present case the record only shows, that the same matters in controversy might have been litigated. Neither the defendants answer, nor the record of the former action, shows that the same matters were litigated. The most they show is, that they might have been. If so, the burthen lay upon the defendants to show the contrary. This they failed to do; it was, therefore, unnecessary for the plaintiffs to prove what they have proved,

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viz.: that the matters in controversy were not litigated, but were withdrawn from the consideration of the referee, and did not pass into judgment."

There is a class of cases in which, as the declaration embraced the cause of action subsequently sought to be enforced, an omission to claim upon it has been held an answer to a subsequent suit. Yet to this rule there are several exceptions and qualifications. Thus a plaintiff declared upon a promissory note and goods sold; but upon executing the writ of inquiry, being unprepared with evidence, he took damages upon the note only. A second suit for the goods was sustained, (*Leddon v. Tutop*, 6 T. R. 608; *Phillips v. Berwick*, 16 John. Rep. 136,) was similar in principle, adopting the rule, that a former recovery, apparently for the same cause, is only *prima facie* evidence that the demand had been tried, but is not conclusive. The work and labor before recovered for was not the same, nor did it grow out of the same contract. The claim was not indivisible, as in *Smith v. Jones*, (15 John. Rep. 229.)

The subject was carefully examined in *Bendernagle v. Cocks*, (19 Wend. 207.) The point decided was, that where an action of covenant was brought, assigning breaches of some of the covenants, a subsequent action could not be supported upon the same instrument, for breaches of other covenants therein. A distinction was allowed where there were breaches of other several covenants in the same contract, and one suit has been brought before the subsequent breaches were committed. Dealings between the parties in an account current, make up but one indivisible cause of action, and the items may not be separated, and several suits brought upon one set. Separate demands, growing out of one general contract, must be combined in one suit. See also the important case of *Bowden v. Hoare*, (7 Bingham, 716,) distinguishing between the effect of a *nolle prosequi* and a *retraxit*, as to several causes of action (a note and goods sold,) in the same suit upon a subsequent suit.

(*Carter v. James*, 13 Meeson & Welsby, 137, Exchequer.) Action on covenant for £600. Plea, that in 1841, the defendant was impleaded by plaintiff in the Queen's Bench, for the same covenant; that defendant there plead usury. Replication denying the bond was given in pursuance of the usurious contract

alleged. Issue upon this replication, and verdict for defendant; settling, therefore, that the bond was given in pursuance of the usurious agreement stated in the plea.

The fact whether the agreement was in truth usurious was not decided by that judgment. The plaintiff in the present suit was therefore at liberty to contest that point. The admission in the replication was only that for the purpose of the pleading in that suit, that there was usury in the agreement stated in the pleas.

We do not find a case which makes a former suit a bar, where it has been expressly limited to one or two distinct contracts, like promissory notes, although such notes have arisen from the same transaction, and where the claim upon the note subsequently sued upon, was not the subject of litigation.

When the record of that action is examined, nothing appears but a promissory note stated as the cause of action, and no actual litigation of any point whatever.

It is true, that to an action upon a judgment, no plea will be allowed of any matter, although new, which could have been plead in the original suit. (*Bank of Australia v. Nias*, 4 Eng. L. & Eq. R. 252.) But that applies, where the defence would have defeated that action in that identical cause, and the judgment has concluded the parties entirely as to such cause. The present distinct contract, or cause of action, was never in suit before.

II. The next question relates to the alleged illegality in the note sued upon.

We think that it must be regarded as established on this record, that the consideration of this note was exclusively a part of the amount of the old debt exacted and agreed to be paid, upon signing the compromise agreement. A part of such consideration, viz.: about \$21.60 was comprised in the note at ninety days, the subject of the former action. The whole of this note was for such consideration.

It is needless to refer to any other cases than that of *Breck v. Cole*, (Sandf. S. C. Rep. 80,) and those cited therein.

The rule is fully established, that every composition deed is, in truth, an agreement between the creditors themselves, as well as between them and the debtor. An additional security or agree-

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ment for debt given secretly to a particular creditor is illegal and void; and whether it be given by the debtor himself, or by another on his behalf.

Judgment for the defendant upon the verdict, with costs.

FOWLER M. RAY *v.* FREDERICK A. AYERS, and another.

A landlord, in whom the reversion in fee is vested, may bring an action against the tenant during the term, for an injury committed by the tenant to the freehold. Judgment, overruling demurrer, affirmed, with costs.

(Before HOFFMAN, SLOSSON and WOODRUFF, J.J.)

April, 1856.

APPEAL from a judgment at Special Term, overruling a demurrer to the 5th subdivision of the complaint.

The action was brought by the plaintiff, as landlord and owner in fee, of certain premises in the city of New York, leased by him to the defendants, chiefly, for the recovery of arrears of rent alleged to be due. The 5th subdivision of the complaint, however, set forth a distinct cause of action, in the following words:

"Fifth. The plaintiff further shows that whilst defendants occupied said plaintiff's premises aforesaid, they broke from the windows of said premises nineteen lights of glass, and that said glass was worth the price, or sum, of eight cents per light."

To this subdivision the defendants demurred, as not containing facts sufficient to constitute a cause of action.

J. Darlington, for defendants, appellants.

Hearne & Warren, for plaintiff, respondent.

BY THE COURT. SLOSSON, J.—The order at Special Term, overruling the demurrer, must be affirmed, with costs.

It has long been settled law that the reversioner may maintain an action on the case, for an injury to the freehold, committed by the tenant, and that the action may be brought before the expiration of the term. (14 East. 489.)

The count, or subdivision, demurred to, is inartificially drawn, but, taken in connection with other averments in the complaint, contains, in substance, a good cause of action.

Order affirmed, with costs.

DAVID CONGREGVE, by his guardian, respondent, v. ANDREW W. MORGAN, and another, appellants.

When the owner of a house and lot constructs a vault within the limits of the street in front thereof, and covers the same with flagging so as to form the sidewalk, he acts at his peril. He is responsible for all injuries resulting from its want of entire safety, for all the purposes for which the public have a right to use such sidewalk.

It is no defence to an action, for an injury sustained by the breaking and falling in of the covering of such vault, that the owner was not guilty of negligence in the manner of its construction.

Nor can the owner defend on the ground that the work was actually done by a third person, with whom he had contracted for its performance, although the terms of the contract required the contractor to use stones, for such covering, in all respects sufficient.

Nor is the owner protected, by showing that the covering had answered the purpose for which it was intended for a year after the completion of the work, and that he had no knowledge that the covering was insufficient.

One who excavates the highway does so at his peril, and if the safety of passers by, or travellers, is impaired, and injury to them results, he is liable; the question of negligence or no negligence, on the part of the owner, in such case, does not arise.

How far, in the city of New York, an authority from the corporation would affect, in such cases, the liability of the owner, *quære?*

Were such an authority shown, the liability of the owner might depend upon the question of negligence in the performance of the work.

Judgment for plaintiff, with costs.

(Before HOFFMAN, SLOSSON and WOODRUFF, J.J.)

April, 1856.

THE action was brought to recover damages against the defendants, as the landlords and owners in fee of a certain lot of land and dwelling house, and its appurtenances, in the city of New York, for a personal injury alleged to have been sustained by the plaintiff, from the negligence of the defendants, as such landlords and owners, in the erection or construction of a flag stone on the sidewalk of the premises.

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The answer denied the negligence charged.

The cause was tried before the Chief Justice and a jury, in October, 1855, and the jury rendered a verdict for the plaintiff for \$650.

The defendants appealed from the judgment entered upon this verdict, and the cause was before the court upon a case containing the proceedings had, and the evidence given on the trial.

The facts established by the evidence, and the questions of law arising thereon, are fully stated in the opinion of the court.

Jas. T. Brady, for the defendants, appellants.

H. Morrison, for the plaintiff, respondent.

BY THE COURT. WOODRUFF, J.—It appears, by the admissions in the pleadings herein—by the defendants' admission, on the trial, and by the written contract, given in evidence on behalf of the defendants—that the defendants are owners of the house and lot situated on the north-east corner of Thirty-first street and the Sixth avenue, in the city of New York; that they purchased the same when the house was in progress of erection, and proceeded to finish it, and, for that purpose, entered into a contract with W. B. & R. Barton, for the performance of the work, requisite to its completion, according to plans referred to in, and specifications annexed to, the contract. Without the line of the lot, and within the lines of Thirty-first street, on the southerly side of the house, an excavation was made for the construction of a vault, or covered area to be used as a vault, under the sidewalk, near the wall of the house, the covering of which, of a uniform surface with the rest of the sidewalk, formed a part of the walk along the southerly side of the house. The defendants' contract with the Bartons provided for the flagging of the sidewalk, and described the flags, to be laid over the area, or vault, referred to; and it may be assumed, for the purposes of the present appeal, that the flags, provided for in the contract, were sufficient and proper for such a purpose, and, had they been used, would have protected all persons passing over them, or standing thereon, from falling into the area or vault beneath.

The plaintiff, an infant, residing with his father, in one of the apartments in the said house, on the 7th day of July, 1853, more

than a year after its completion, was standing, or ran, upon the sidewalk, over this area or vault, when the flag-stone, which formed the covering thereof at that place, gave way, and the plaintiff, with the broken stone, fell into the area or vault beneath. His leg was so broken that amputation became necessary. This action is brought to recover damages for the injury thus sustained.

The complaint, in substance, denies that the defendants had any right, or lawful authority, to construct such vault, and cover the same; and, also, avers that, whether the same was done with, or without lawful authority, it was the duty of the defendants to put and construct, over and above such excavation, a safe and sufficient covering, of stone, or other proper material, to render the same safe and secure, to the public and persons lawfully travelling upon the said sidewalk, and upon and over the said excavation.

On the trial, after proof of the circumstances attending the injury, and its consequences, the description of the place where it occurred, the breaking of the stone, &c., evidence was given tending to show, not only that the stone used as a covering was not such, nor so good, as was required by the contract, but that the stone was an insufficient, unsuitable, defective and improper stone to be used for such a purpose; and also that it was not properly supported at the ends, and that it was negligence to cover the area, or vault, with such a stone, set in the manner in which this stone was placed.

On these points, there was a conflict of evidence, and the Judge, at the trial, stated to the jury, that the great weight of the testimony was, that there was no objection to the manner of placing the stone, and left to the jury the question, whether the stone was such as a prudent and discreet mechanic would use.

The questions raised, upon the defendants' motion for a nonsuit, and by his objections to evidence, are sufficiently embraced in the question created by exception to the charge of the Judge, and need not be separately considered, for, if no error was committed in the charge, of which the defendants can complain, the other objections are either groundless, or have no application to the facts, upon which the rights and liability of the parties depend.

The defendants insisted, that, having made a contract with the Bartons—skilful and competent architects and mechanics—which called for the best materials, to be applied in a good and workman-like manner, they were not responsible for the contractors' negli-

gence, or for defects in the construction, but that the liability, if any, rested upon the builders, and not upon the owners. Upon the doctrine of *Blake v. Ferris*, (1 Selden, 48,) *Peck v. The Mayor, &c.*, (4 Selden, 222,) and see *Peasley v. Rowland, et al.*, (16 Eng. L. & Eq. R. 442,) and cases cited, and in note, (p. 444.)

Also that, at most, the evidence showed only an error in judgment, in respect to the sufficiency of the stone, and the mode of setting it, which would not make the defendants, nor even the contractors, liable in this action.

The Judge charged the jury, among other things, that the defendants, having made a contract for the construction of the house, and the covering of this area, are responsible for the Bartons—the contractors—or any one, employed by them, and they were bound to use the skill and judgment of prudent and discreet men, and that the question seems to be narrowed down to this—whether this stone was such as a prudent and discreet mechanic would use.

We are of opinion, that there was nothing, in this instruction, of which the defendants can complain.

The cases, to which we are referred, wherein it is held, that where one, in the exercise of his lawful rights, and for the doing of that which he has full right and authority to do, contracts with another, exercising an independent employment, to perform the work, he is not responsible for the negligence of the servants of the latter in the manner of its performance, such as *Blake v. Ferris*, and other cases, we think do not apply to the present case.

Here, the vault or area was constructed in a public street and highway, and no warrant, or authority therefor whatever, is shown. It was kept and maintained, by the defendants, for their private gain and advantage. Whether done through the instrumentality of a contractor, or by the defendants' own hands, it was done by them, and they had no right, or authority, as owners of the contiguous house and lot, to make any use of the street, in front, or of any part of it, inconsistent with the safe and convenient use of it by the public, or so as to hazard the safety of individuals passing and repassing along the same. If, under such circumstances, they undertake to construct and maintain a vault, under the sidewalk, it is a very light measure of responsibility, which charges them with the consequences of negligence, in the manner of doing it. Where the act done is not lawful, whether it is done by the de-

fendant, directly, or by his servant, or by a person employed by him in any other form, it is his act, and he is responsible—even though, himself, ignorant of the precise manner of its performance. (*Rex v. Medley*, 6 Carr & Payne, 292.) And clearly so, if, the work being unlawful, it is negligently done, and damages are caused by the negligence. In *Ellis v. The Sheffield Gas Consuming Company*, (22 Eng. L. & Eq. R. 198; 2 Ellis & Blackburn, 767,) the defendants were sued for digging a trench in a public street, and heaping up stones and earth so as to obstruct it, whereby the plaintiff, lawfully passing, &c., fell and broke her arm. The work having been done by persons contracting with the defendants, the latter insisted upon the doctrine, above alluded to, that a man is not responsible for the acts of the servants of their contractors, and relied upon the English cases to that effect; but the court held, that the defendants had no right to break up the streets at all, and if they employed the persons, who did it, to break up the streets, and, in so doing, to heap up earth, &c., they were liable—and this, notwithstanding it might be, that, if the workmen employed had been careful, in the way in which they heaped up the earth and stones, the injury would not have been sustained. The unqualified duty of one, who makes an area abutting upon a public road, to fence it so as to protect passers by, is adverted to in *Barnes v. Ward*, (2 Carr & Kir. 661, at *nisi prius*, and 9 Com. Bench R. 392,) at bar, and the defendant, in that case, was held liable, though the excavation was no part of it within the limits of the road: and in *Stone and wife v. Jackson*, (32 Eng. L. & Eq. R. 349,) that case is approved.

But, in the case of *Dygert v. Schenck*, in our own state, (23 Wend. 446,) the principle established seems to us to go even further than is required, in this case, to show that the defendant is not prejudiced by the charge. In that case, the defendant, for his own private use, had dug a race way across a highway, the fee in which was vested entirely in himself, subject only to the public uses, and had covered the race way by a bridge which, after ten years, became out of repair, and the plaintiff's horse fell through and was injured. The right of the public to require that he should keep the road as good as it was before he dug his ditch, is made the ground of holding the defendant liable. The court say, "Any act of an individual, done to a highway, though performed on his

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own soil, if it detract from the safety of travellers, is a nuisance. A ditch dug in a high way was specifically pronounced a nuisance. Special damage arising from it, therefore, furnishes ground for a private action, without regard to the question of negligence in him who did it. The utmost care to prevent mischief will not protect him, if the injury happen without gross carelessness on the side of the sufferer." (See the cases there cited.)

We apprehend that it would not have been erroneous, had the Judge, upon the authority of the cases above cited, gone even further, and charged that the defendants could not (without showing some authority for that purpose) construct and leave such an excavation under the sidewalk, in the public street, except at the peril of being held responsible for all injuries resulting from its want of entire safety, and sufficiency for all the purposes for which the public have a right to use such sidewalk, and that they were bound to keep and maintain the covering in a secure and safe condition, at their peril. And such rule does not involve the inquiry in whom is the fee in the land forming the street, (though it is not claimed here that the fee is in the defendant.)

If this be so, then surely the defendant cannot complain of being held responsible, when the rule was so far relaxed as to make their liability arise only when it was found that there was negligence in the construction or covering of the excavation, done by their express contract, and maintained by them for their own profit.

We do not intend to deny the power of the corporation of the city of New York, over the subject of the excavation and construction of vaults, areas, &c., within the lines of the public streets, nor to say that an authority, procured by the defendants, from them, to construct the vault in question, might not have changed the whole question of liability into one of negligence only. In which case, whether they would have been liable for the insufficiency of the stone in question, placed there without any knowledge, by them, of its insufficiency, or any means of knowledge, we do not intend to say. No such authority was shown, and no ordinances of the corporation, general or special, were given in evidence.

One of my brethren suggests that the defendants are liable, upon a ground stated by Mr. Justice Bronson, in *The Mayor &c., of Al-*

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bany v. Cudliff, (2 Comstock, 174.) That the contractors having done their work, and delivered over the house, with its appurtenances, many months before this injury to the plaintiff occurred, the defendants are liable for the negligence in the construction of an insufficient covering for the vault. That the owners are liable to third persons for the sufficiency of the work, whether the builders be or be not liable, in turn, to him, for the negligence in the construction, which caused the injury. That had an injury to the plaintiff happened from the negligence of the contractors, while engaged in the work, they would have been liable, and the owners not, in accordance with *Blake v. Ferris*, and other cases above referred to; but after the work is completed, and the owners have been for months in possession, third persons may look to them for damages, if injured by reason of negligence, even in the construction, and the owners must seek their indemnity from their contractors.

We think that the judgment should be entered for the plaintiff upon the verdict, with costs.

JOHN LIVOR v. JOHN ORSER, sheriff.

Goods, exempt by law from an execution, were seized by the sheriff, under a *f. fa.*

At that time, they were covered by a mortgage, payable on demand, and containing a clause, that until default in the payment, the mortgager should remain in possession of the property. In an action against the sheriff, he set up, that the title was out of the plaintiff, and in the mortgagee.

Held, that until demand and failure, at least, if not until possession, the mortgager had a leviable interest, the subject of execution and sale.

Held, that, as between the mortgager and sheriff, the property must be taken at its full value, without regard to the amount of the mortgage.

Held, that the case does not differ in principle, from that where the mortgager is allowed to retain possession until a debt, payable at a definite time, becomes due.

(Before HOFFMAN, SLOSSON and WOODRUFF, J.J.)

April, 1856.

Motion for judgment upon a verdict taken, reserving the question of law for the consideration of the General Term, with liberty

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to enter judgment dismissing the complaint, or for the defendant, and with liberty to turn the same into a bill of exceptions.

Every fact is stated in a case made and signed by the respective attorneys, which is as follows:—

This cause was tried before Hon. Thomas J. Oakley and a jury, May 18th, 1855. The action was for taking the goods and chattels of the plaintiff out of his possession, alleged by the complaint to have been taken on the 20th day of January, 1855, the plaintiff claiming them as exempt from execution. It was admitted by both parties, that the goods for which this action was brought, had been taken by the defendant as sheriff of the city and county of New York, under, and by virtue of an execution upon a judgment of this court against the property of this plaintiff, in favor of Julius Helmuth and Louis Shurith, and which execution was delivered on the 4th day of February, 1855.

The defendant here objected to any evidence being given, showing this property was exempt from levy and sale under execution, on the ground that there was no averment in the complaint claiming and alleging it was exempt, but the said complaint was in the ordinary form of a complaint in trover and conversion.

The court overruled the objection, and decided that such averment was unnecessary in the complaint, to which ruling and decision the defendant excepted.

The plaintiff gave evidence tending to show, that he was a householder, having a family for which he provided, and that the articles set forth in the complaint were necessary, and therefore exempt from levy and sale under execution, under and by virtue of the provisions of the act of the legislature of the state of New York, for the exempting of household furniture from distress for rent and from execution, and other acts exempting household furniture from levy and sale under execution against householders, and persons providing for families.

The deputy sent his assistant on the 7th day of January, 1855, with the said execution to the defendant, who demanded payment thereof, and made a list of the goods in the house and returned the same to the deputy sheriff, the deputy sheriff not being with said assistant at the time.

The deputy sheriff, on the 20th day of January, 1855, in person, proceeded to the premises of the plaintiff and removed the goods.

The defendant gave in evidence a chattel mortgage made by the plaintiff to James Mitchell, dated the 8th day of January, 1855, on the furniture of the plaintiff, including the goods in question, for the payment of the sum of two hundred dollars. The mortgage was payable on demand, and provided, that until default in the payment, the mortgager should remain in the possession of the goods.

Either party may refer to the mortgage on the argument, and the same is considered as a part of this case.

The defendant asked his Honor to dismiss the complaint upon the grounds that the giving of the mortgage divested the plaintiff of all title to, or interest in, the property, and vested the same in the mortgagee, and that therefore the plaintiff could not maintain this action.

The court refused to dismiss the complaint, and reserved the question for consideration of the court at a General Term, to be heard in the first instance, at the General Term, with liberty to court to enter judgment dismissing the complaint, or for the defendant, and with liberty to turn the same into a bill of exceptions, and submitted all questions of fact to the jury.

The jury, under the charge of the court, rendered a verdict in favor of the plaintiff for twenty-five dollars damage.

M. Pinney, for the plaintiff.

A. J. Vanderpoel, for the defendant.

BY THE COURT. HOFFMAN, J.—The case is briefly reduced to this:—An owner of personal property has mortgaged it to secure a sum payable on demand, with a stipulation, that until default in the payment, he, the mortgager shall remain in possession. Before any demand, and while in possession, a judgment is recovered against him. But the property was by law exempt from execution. The sheriff has seized it. The action is to recover the value of the articles thus taken. Can it be sustained? The defence is, that the mortgage vested every right in the mortgagee, so that the plaintiff has not an interest which enables him to sustain a suit.

In the case of *Hull v. Carnley*, (2 Duer, 103,) the mortgage was

dated the 14th of August, 1850, to secure \$250. Of this sum, \$100 was payable in six months: viz., on the 14th of February, 1851, and \$180 in one year, viz., the 14th of August, 1851. The judgment and execution were in September, 1850. No part, therefore, of the mortgage-money was due, and the provision in the mortgage was like that in the present case, that the mortgager might remain in possession until a default in the payment.

The decision in this court involved these points, applicable to the present case:—That a chattel mortgage vests the whole title in the mortgagee, where, by its terms, he is entitled to the immediate possession. The property, in such case, cannot be levied upon under an execution against the mortgager, even if he have remained in possession. He is but a bailee at sufferance. But if the mortgager be entitled to possession for a definite period, and is in possession, the weight of authority appears to be, that his possessory interest is the subject of a levy and sale.

This last proposition received in the Court of Appeals in the same case, an explicit sanction. Denio, J., treats it as established law, (1 Kernan, 505.)

The difference between this court and the Court of Appeals, consists in the latter holding that the sheriff may sell in such case the whole interest, without recognising the lien of the mortgage. This difference is of no consequence upon the present question. That question is, whether there is any reasonable ground for a distinction between the case of a mortgage payable at a future day, and one payable on demand, where there is a possession retained and held by express stipulation?

In the one case there is an allotted period fixed until the expiration of which, the right is entire, and the interest leviable. In the other, the period is to be limited by a future, not an existing, determination, of the mortgagee. It may be of a long or a very brief duration; but it is perfect until that decision, which terminates it, is made known. While that is in suspense, the actual right and enjoyment are as complete and absolute, as in the case of a definite period prescribed for payment.

Portions of the reasoning of the learned Judges, both in the Court of Appeals and in this court, appear to support this view. Judge Denio says:—"Assuming the chattel mortgage to have been a valid instrument, (and I see no reason to doubt but that it

was such,) the sheriff had a right to sell the interest of the mortgager, and to deliver the property to the purchaser, and the purchaser was warranted in taking it into possession, and in using it until the day of payment; and he had, moreover, the right to pay the mortgage debt, and thus extinguish the lien." Why is not such a right the proper subject of a private sale, and of a levy, when the possession and right are indeterminate, as when it is ascertained?

Justice Duer, also, in delivering the opinion of this court, observes, that "the main object of a mortgage, as distinguished from a pledge, is to enable the debtor to retain the possession and enjoyment of the property so long as he fulfils the conditions of the contract; and this is just as true of a mortgage of chattels as of lands." Now, no one will deny that the interest of a mortgager of lands, whose debt was payable on demand, would be liable to a sale on an execution against him.

The levy then, would, in my opinion, have been perfectly justifiable, but for the question of exemption. It would have been legal as made upon the property of the plaintiff subject to an execution. But the moment we arrive at this conclusion, the defence fails, for this property of the plaintiff was exempted by the law from an execution.

It is necessary to examine carefully one of the points on the part of the defendant, which has raised some doubts in our consideration of the case.

It will have been noticed, that our conclusion is, that the mortgager in a case like this, is, until demand and refusal, in precisely the same position as if the debt was not payable until a fixed, future period. It is also to be noticed, that the Court of Appeals hold, that the purchaser under the execution against the mortgager, takes the goods subject to the mortgage. The mortgagee also could here have sustained replevin; at any rate, upon making his demand for payment.

In our opinion, a mortgagee who thus neglects his rights; who omits a demand; whose claim was not, from what here appears, known to the sheriff; and who may pursue the goods with his lien, cannot sustain an action for the taking of goods, which could be lawfully levied upon and sold. His marked negligence cannot entitle him to a privilege. He was not, in strictness, an owner

* But see *Howland v. Willet*, (8 Sand. S. C. R. 607).

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until demand. In the analogous case of a pledge, it is well settled, that where the deposit is for an indefinite time, or where the debt is payable on demand, the pledgee cannot sell until he has called upon the pawner to redeem. (*Garlick v. James*, John. Rep. 150; *Wilson v. Little*, 1 Sand. S. C. Rep. 356.)

In the case of *Hinman v. Judson*, (13 Barbour's Rep. 629,) some important and relevant points are recognized and decided. That the mortgagee of chattels, after forfeiture, the debt being due, is the absolute owner; that the mortgager had still a right to redeem, in equity, before the Code; that, in trover, the mortgagee could, however, have recovered the whole value of the goods taken: it would not be limited by the amount of his demand. But, since the Code, a defendant could avail himself of any equitable defence formerly available in chancery; and hence, where the defendant was a purchaser, under an execution, against a mortgager in possession before the day of payment had arrived, the mortgagee could only recover, in damages, the amount of this claim and interest. The interest of the mortgager was plainly vendible, under an execution.

It appears to us, therefore, clear, that, but for the statute of exemption, there would have been a vendible interest in the present case, and that the sheriff would have been fully justified in seizing and selling the property. The mortgagee would have been bound to protect his own interests. As between the sheriff and the plaintiff, the property must be treated at its full value.

The counsel have assimilated the case to that of a bailee; as if, for example, the debt had become due, and the mortgagee's right was consummated. In such a case, the bailee, I apprehend, would be a mere depositary; but, as such, he could maintain trover. (*Wateman v. Robinson*, 5 Mass. 303; Story on Bailment, p. 110; *Lyle v. Barker*, 5 Binney, 457.) Mr. Parsons states the rule to be, that the bailee has a special property, and may maintain any action which requires such property in the plaintiff, against a third party, for an injury to the pledge, and a judgment in such action, brought by the pledgee or the pledgor, would bar an action, for the same cause, by the other party. On Contracts, (vol. i., p. 592)—citing three cases from the Year Books, and *Fleuellen v. Race*, (1 Bulstrode, 68)—Justice Story (on Bailment, 94,) states that both bailor and bailee may sustain an action against a wrong doer, and that a re-

covery by one, will bar an action by the other—citing 2 Saunders, (47,) with other authorities.

But we do not deem it necessary to enter into a question of no little difficulty in its application. We treat this as a chattel-mortgage, similar, for the present question, to one where the right of possession is for a definite period.

There must be judgment for the plaintiff, upon the verdict, with interest and costs.

WALTER KEELER v. OLIVER DAVIS, SMITH DAVIS, and HANNAH DAVIS, his wife.

A lease contained a clause to the effect, that, if the yearly rent, or any part thereof, should remain unpaid, on any day of payment, for the space of fifteen days, or if default should be made, in the performance of any of the covenants contained therein, it should be lawful for the lessor to re-enter, and to remove all persons therefrom.

Held, that an action to recover possession could be maintained, without giving the fifteen days' notice, prescribed by the statute in certain cases.

The receipt of rent, by a landlord, after the breach of a covenant in a lease, creating a forfeiture, does not operate as a waiver of the forfeiture, unless his knowledge of the breach, when he received the rent, is clearly proved; and, upon that question, a verdict of the jury in his favor, unless plainly against evidence, is conclusive.

Judgment for plaintiff.

(Before HOFFMAN, SLOSSON and WOODRUFF, J.J.)

April, 1856.

CASE upon a general verdict, rendered for the plaintiff, subject to the opinion of the court, on the questions of law reserved, to be argued, in the first instance, at the General Term, and judgment, in the mean time, to be suspended.

The plaintiff, on the 1st of May, 1851, gave a lease to the defendant, Oliver Davis, of certain lots of ground, on the west side of avenue B, in the city of New York, for the period of ten years, from the said 1st of May, 1851, at an annual rent of four hundred dollars, payable quarterly, on the first days of May, August, November, and February, of each year.

The lease contained a clause to the effect, that, if the yearly rent

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reserved, or any part thereof, shall be behind or unpaid on any day of payment, whereon the same ought to be paid, as provided for, in the space of fifteen days, or if default be made, in the performance of the covenants, or any of them, on the part of the lessee, to be performed, it should be lawful for the lessor to re-enter, and remove all persons therefrom.

The lessee did not pay the rent, which fell due, respectively, on the 1st of February, May, August, and November, 1853, and the 1st of February, 1854.

The lease contained, also, a covenant that the lessee would not assign the same to any person, without the written consent of the lessor. It was alleged that an assignment had been made, to Hannah Davis, without such consent.

The action is, to recover possession of the premises, and the value of the rents and profits.

The defence was, that the rent was not due, as stated; that the assignment had been made, with the knowledge and assent of the plaintiff; and that, even if the rent were not paid, the plaintiff could not recover, because he had not given fifteen days' notice, under the statute. The cause was tried before the Chief Justice and a jury, in January, 1856.

It was proven, at the trial, that an assignment was made to Hannah Davis, on the 20th of December, 1852, for the balance of the term.

On the 17th of August, 1853, a receipt was given, by the plaintiff, for the rent due on the first of that month, and on the 1st of November, 1852, for the rent then due; both given to Oliver Davis. On the 1st of February, 1853, a receipt was given, of which the following is a copy:

“Received, New York, February 1st, 1853, of Oliver Davis, by Mrs. Hannah Davis, one hundred dollars, for the amount of rent due the first of November last, for ground-rent of lots in avenue B, between Twelfth and Thirteenth streets. W. KEELER.”

Some evidence was given, as to conversations with Keeler, the plaintiff, at the time of giving this receipt, as to his knowledge of the assignment and assent to it, which it is needless to state.

The court charged, that the plaintiff relied upon two grounds

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of forfeiture: 1st. The non-payment of rent; 2d. That the lease had been assigned without the plaintiff's assent, as required by it. Whether the lease was forfeited, by the non-payment of rent, was a question of law thereafter to be considered. As to the assignment, the court observed, that the receipt of February must have been for the rent then falling due, or that of 1st November, 1852, was in full to that date; and submitted to the jury the question: "At the time of the payment of the rent, on the 1st of February, 1853, did, or did not, the plaintiff know that the lease in question had been assigned to Hannah Davis?" The jury answered, "that he did not know."

A general verdict, for the plaintiff, was then entered, as before stated.

J. E. Burrill, for plaintiff.

H. G. Wheaton, for defendants.

BY THE COURT. SLOSSON, J.—It seems to me that the finding of the jury, in favor of the plaintiff, upon the question, whether, at the time of the payment of the rent on the 1st of February, 1853, he knew that the lease had been assigned to Hannah Davis, must be conclusive. If the plaintiff did not know of the assignment when he received the rent, he certainly did not, by receiving it, waive his right to insist on the condition. But the defendant contends that, though it may be true, that he did not know of the assignment at the time he received the rent, yet it does not follow but that he consented, or had previously consented, to the assignment, and he insists that the evidence of what took place at the time of the payment of the February rent, shows that such assent had been previously given, or was given at that time. As to the latter supposition, it may be said, that if the evidence could be construed into proof of an assent then given, even if evidence of a past assent were admissible, it could not affect the plaintiff, except by way of estopping him from setting up the breach of the covenant; but as the defendant had already made the assignment, and, therefore, did not act upon such assent, the doctrine of estoppel does not apply. As to the evidence showing that an assent had been previously given, it is enough to say, on the same principle, that unless it prove such assent to have been given before

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the assignment was, in fact, made, and that the assignment was made in consequence of it, it would not operate as an estoppel.

The evidence, even if it shows a previous assent, (which can hardly be contended,) certainly does not go to the extent of showing that the assignment was made in consequence of it. The question, therefore, of an assent, as distinct from the plaintiff's knowledge of the fact of the assignment at the time he received the February rent, was not put to the jury, and there was certainly no evidence to go to the jury of a previous assent acted upon.

The court looked at the question as one of waiver merely, and, therefore put to the jury the simple inquiry as to plaintiff's knowledge of the assignment at the time he received the rent, and we think this was the correct view to take of it. The finding of the jury, on this question, is conclusive on that of waiver, and we think it supported by the evidence. This disposes of the case, and it is unnecessary to consider the question of the forfeiture on the ground of the non-payment of the rent.

Plaintiff is entitled to judgment for the possession.

HOFFMAN, J.—The jury find that the plaintiff had no knowledge of the assignment to Hannah Davis on the 3d of February, the date of his receipt for rent. This may be treated as negating any knowledge of, and any assent to, an assignment prior to that time.

If it cannot be so taken, yet the testimony to the fact is very feeble, and that is only to a parol consent. The plaintiff had guarded himself against parol evidence to a consent, by the stipulation that it should be in writing.

Subsequent acts, such as receipt of rent from Hannah Davis, with knowledge, might suffice. They might be a recognition of her title, and a waiver of the written consent.

There is no receipt of rent after the 1st of February, and what is deposed to as to the plaintiff's language then, is not only very loose, but, as tending to prove a parol consent, is, in my opinion, inadmissible.

The main question is as to the notice of fifteen days. The statutory provisions bearing upon this point, are 2 R. S. 505, § 31, and the law of 1846, ch. 274. See, also, the case of *The Mayor, &c. v. Campbell*, (18 Wendell, 156).

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The first section of the act of 1846 is, "Distress for rent is hereby abolished." This annuls the clause in the thirty-first section of the act of 1830, "And no sufficient distress can be found on the premises to satisfy the rent due." The statute will then be entirely applicable to the present case.

The second section of the act of 1846, relates to a reservation of the right to re-enter, in default of a sufficiency of goods and chattels to distrain. Where the lease itself contains that provision, the fifteen day's notice entitles the landlord to re-enter, although there should be a sufficiency of goods on the premises. That is, although there is such a clause, on which the re-entry is made to depend, and although there is enough to distrain upon, the right to re-enter is conferred, provided fifteen days' notice is given.

In the present case, there is no such clause in the lease.

Judgment for plaintiff.

JAMES SALMON v. JOHN ORSER, sheriff.

In an action, by a vendee of personal property, against the sheriff, who has taken the property under execution against the vendor, it is sufficient for the plaintiff to prove his purchase, the payment of the consideration, delivery to him, and his actual and continued possession down to the time of the levy. He is not bound to go further, and prove affirmatively that the sale was made in good faith, and without an intent to defraud creditors of the vendor.

The defendant, in such case, if he defend on an allegation of a fraudulent sale, has the burden of proof.

It is where the possession is not changed, or, if the vendee has taken possession, where the vendee's possession has not been continued, that the statute casts upon him the burden of showing that the sale was in good faith, and without any intent to defraud, &c.

Declarations of the vendor, made to his wife prior to the sale, and forming no part of the negotiations with the vendee, are not competent evidence to show, in favor of such vendee, that the intention of the vendor was not fraudulent.

(Before HOFFMAN, SLOSSON, and WOODRUFF, J.J.)

April, 1856.

The action was brought to recover damages for the wrongful seizure, taking, and carrying away by the defendant of three coaches belonging to the plaintiff. Judgment was demanded for \$1,350, besides costs.

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The answer denied the possession and ownership of the plaintiff, and justified the seizure under an execution against the goods of one Charles Hannan, who, it was alleged, was the true owner of the property.

The cause was tried before Campbell, J., and a jury, in February, 1855.

The plaintiff proved, and read in evidence, a bill of sale, dated the 1st of October, 1853, by which Charles Hannan, in consideration of the sum of \$2,000, bargained and sold to the plaintiff four coaches—three of which were those for which the action was brought—several wagons, sets of harness, and spans of horses. All this property was connected with a livery stable, which had been occupied and carried on by Hannan, and the lease of which it was also proved, was assigned to the plaintiff. Evidence was also given on the part of the plaintiff, tending to show the payment of the consideration mentioned in the bill of sale, and that the plaintiff had taken immediate possession of the stable and property sold; had from that time kept the stable in his own name, and was in the actual possession of the coaches in question when they were taken and carried away by the defendant.

Among other witnesses, the wife of Hannan was examined on behalf of the plaintiff, to prove the good faith of the sale made by her husband, and the following, among other questions, was put to her:—

“Did you hear any thing said before you heard the sale talked of?”

The counsel for the defendant objected to the question; the objection was overruled, and the counsel excepted. The witness said, in answer to the question, that she heard her husband say, that he must sell out to her brother, (the plaintiff,) as he could not pay him the money that had been loaned to him.

The witness had before testified that she was present when the plaintiff loaned to her husband \$2,000 in gold.

On the part of the defendant, the judgment and execution under which he justified, were proved, and the seizure under them, and evidence was given tending to show, that the sale to the plaintiff was colorable, and that the possession had, in fact, never been changed, but was retained by Hannan as owner.

When the evidence was closed, and the counsel had summed up on the questions of fact—

The Judge charged the jury, that the question for them to consider was, whether the plaintiff was a *bona fide* purchaser of the property levied upon by the sheriff, and whether, at the time of such purchase, he went into possession, and continued in such possession as sole and exclusive owner. If he was such purchaser, and went into possession as sole owner, and such purchase was made in good faith, then the plaintiff is entitled to your verdict. If the purchase was not made in good faith—was a mere pretence, or if the plaintiff did not go into exclusive possession—if, in point of fact, his brother-in-law Hannan still remained in virtual possession—then defendant is entitled to your verdict. The counsel for the defendant requested the Judge to charge the jury—

First. That they might infer from the relation of the parties and other facts proved, that Salmon had notice of the debt due to Rogers and Kilham, at the time of the alleged sale from Salmon to Hannan.

The Judge refused so to charge, to which refusal the counsel for the defendant duly excepted, and then requested the Judge to charge—

Second. That the sale in controversy was, in law, fraudulent and void as to existing creditors, without regard to the motives of the parties thereto in a moral sense, if such sale was not accompanied by an immediate delivery of the property sold to the vendee, and followed by an actual and continued change of possession of such property

The Judge refused so to charge, except as he had already charged, and the counsel for the defendant thereupon duly excepted to such refusal, and then requested the Judge to charge—

Third. That there was no evidence to go to the jury of an immediate delivery of the property sold by the vendor to the vendee.

The Judge refused so to charge, and the counsel for the defendant duly excepted to such refusal, and requested the Judge to charge—

Fourth. That unless the jury find that the plaintiff has proved that the sale was made in good faith, and without an intent to defraud creditors, they must render a verdict for the defendant, even though there was an immediate delivery of the property sold to the vendee, followed by an actual and continued change of possession; and that such sale and delivery would, in that event, be im-

material, except so far as they might affect the question of good faith and intent to defraud creditors.

The Judge refused so to charge, except as he had already charged, to which refusal the counsel for the defendant duly excepted, and requested the Judge to charge the jury—

Fifth. That if the jury find that the possession from and after the sale of the property sold was joint between Hannan and Salmon, that will not avoid the presumption of fraud in law, and the sale will be void.

The Judge charged, that such a joint possession would not be sufficient to satisfy the statute, but refused to charge as to the rest of the request, except as he had already charged, to which refusal the counsel for the defendant duly excepted.

The jury found a verdict for the plaintiff, and the presiding justice directed that time be given the defendant to make a case containing the testimony and exceptions, to be heard in the first instance at the General Term of this court.

The cause was now heard upon the case made by the defendant.

A. J. Vanderpoel, for the defendant, insisted that there ought to be a new trial.

The question put to the wife of Hannan, which was objected to, ought not to have been allowed. The evidence it called for was no part of the *res gesta*, it was mere hearsay. The Judge, also, erred in refusing to charge, as requested, and particularly in refusing to charge in conformity to the fifth request. He cited, on the first point, 14 John. 204; 1 Barb. Ch. 105; 4 Comst. 519; 7 Hill, 361; 1 Hill, 612; and upon the second, 4 Denio, 271; 4 Hill, 291; 3 Sand. S. C. R. 69; 3 Comst. 310.

A. R. Dyett, for the plaintiff, contended that the declarations of Hannan, testified to by his wife, were part of the *res gesta*, as showing his motives in the transaction, and were, therefore, properly admitted in evidence, and he insisted that the charge of the Judge was, in all respects, correct, and covered all the points that could properly be submitted to the jury. He cited 1 Duer, 424; 1 Kern. 61; *id.* 416; 3 Sand. 230; 3 Selden, 453; 5 Wend. 209.

BY THE COURT. WOODRUFF, J —1. The charge of the Judge

on the trial is in substantial conformity with the requests made by the defendant's counsel, except in one particular, viz., the fourth request. "That unless the jury find that the plaintiff has proved that the sale was made in good faith and without an intent to defraud creditors, they must render a verdict for the defendant, even though there was an immediate delivery of the property, followed by an actual and continued change of possession."

The Judge very properly refused so to charge. The counsel proposed to impose upon the plaintiff the same burden of proof where he purchased and took and retained actual and continued possession, as the statute casts upon him when the possession is not changed or when the change is not continued. The law does not warrant any such rule. The plaintiff, being shown an actual purchaser, a payment of the consideration, and a taking and a keeping of the possession of the property, the burden of proof is cast on the defendant if he seeks to impeach the title on the ground of fraud. He must show that the transaction is fraudulent and with intent to hinder, delay, or defraud creditors. The case of *Randall v. Parker*, (3 Sandf. 69,) does not, therefore, apply to this case. What is said there of the duty of the plaintiff to show the absence of an intent to defraud, is applied only to a case in which the possession is not changed, &c.

2. We think the questions of fact, which the Judge submitted to the jury, were properly submitted. There was evidence for their consideration.

3. As to all of the exceptions to the ruling of the Judge, admitting or rejecting evidence, we find one only which we think was erroneous, or that furnishes any ground for setting aside the verdict. That is the question put to the wife of the judgment debtor (Hannan, the vendor of the property in question). She had testified that she knew of the plaintiff's lending her husband \$2,000—which \$2,000 was alleged to be the consideration of the subsequent sale. She had stated that she was not present at the sale, and did not know of it until they (plaintiff and her husband) told her. That she did not recollect when it was, but should think it was in the fall after the money was loaned. The plaintiff's counsel then put the following question: "Did you hear any thing said before you heard the sale talked of?" This question was objected to by the defendant's counsel. The objection was overruled, and

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the defendant excepted. If we had not before us the answer of the witness, which throws some light upon the object of the question, and what the plaintiff's counsel intended to elicit, we should feel surprise that so loose and general a call, for mere hearsay evidence, should have been even suggested by counsel. It is true that the question does not expressly call for what was said, but it was manifestly understood to embrace that, and the objection was pointed to that. The witness so understood it, and so answered it. The question does not limit the inquiry to what was said by the plaintiff, or Hannan (the husband) or by the defendant—but, for aught that the question discloses, may embrace all the neighborhood. Nor does it call only for what was said in the presence of the plaintiff. But the answer of the witness points the question—she replied, “I heard my husband say that he must sell out to my brother, (the plaintiff,) because he could not pay him the money.”

The answer makes apparent that the object was that which the respondent's counsel, on the argument, insists made it proper, viz.: to show the intent of her husband in making the sale.

The end to be gained was, no doubt, material, but the means were not admissible. The evidence was mere hearsay, on a subject which could, and ought to be, proved by the husband himself. He could not, by such declarations to third persons, make evidence for the plaintiff. His declarations, (forming no part of the *res gesta*; the act of sale,) were not evidence of the facts declared, and no more evidence of an intent than of any other fact. A witness may be impeached by proof of declarations, out of court, inconsistent with his testimony, and there are, perhaps, cases in which an impeached witness may be shown to have told the same story out of court, which he has narrated under oath. But the declaration of a third party, out of court, not examined as a witness, is not evidence of the fact stated in such declaration. It is mere hearsay, whether stated to his wife, or any one else. We find no ground upon which we can sustain the admission of this evidence. We regret to disturb the verdict, upon this ground, for we think the verdict would have been the same had not this testimony been received. The evidence is quite sufficient to warrant such a verdict. But we cannot say that this testimony may not have influenced the jury. The ruling, by which it was permitted

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to be given, in effect, informed the jury that Hannan's declaration was proper to be considered, in determining whether the sale was in good faith, and for value, and we cannot say that they did not place reliance upon it.

Upon this sole ground, then, we feel constrained to set aside the verdict, and order a new trial, costs to abide the event.

GROSVENOR v. THE ATLANTIC FIRE INS. CO., OF BROOKLYN.

Where a mortgager effects an insurance upon his house, and, as a security to the mortgagee thereof, procured a policy from the defendants, providing, in terms, that the loss, if any, should be payable to the plaintiff, as such mortgagee, a subsequent act of the mortgager, though in violation of the conditions of the policy, will not defeat the right of the plaintiff to recover, if a loss occurs.—WOODRUFF, J.

The insertion, in the policy, of the words, "loss, if any, payable to S. G., mortgagee," operates to give the mortgagee an interest in the policy, and to invest him with the same rights which he would have, if, without such words in the body of the policy, the mortgager had assigned to him the policy, with the express consent of the insurers.—WOODRUFF, J.

It is settled law, in this state, that an assignment of a policy, by the assured to his mortgagee, with the express consent of the insurers, will enable the mortgagee to recover, in case of loss, although the assured may have done acts, which, by the terms of the policy, render it void.—BOSWORTH, J.

A policy which, by its terms, declares that the loss, if any, shall be payable to the mortgagee, is an equally effective protection of his interests. Whatever effect may be given, justly, by the courts to the former, should also be given to the latter transaction. By each, the loss, if any, by the express consent of the insurer, is made payable to the mortgagee. The fact of such consent, in whichever form expressed, must be presumed to have been sought, and given, with the intent, and for the purpose, of securing the mortgagee, as well in the one case as in the other, and to the same extent, in each.—BOSWORTH, J.

(Before BOSWORTH and WOODRUFF, J.J.)

Heard, January; decided, April, 1856.

THIS action comes before the court on a verdict taken, subject to the opinion of the court, at General Term, and upon an order made at the trial, that the questions of law which it presents, should be first heard at the General Term. It was tried before Mr. Justice Slosson, and a jury, on the 22d of November, 1854.

Eugene McCarty, by a mortgage, dated November 1, 1853,

mortgaged the premises covered by the policy, subsequently issued to Edward Kellogg, to secure the payment of \$6,250, and interest, according to the condition of a bond, of the same date, executed by McCarty to Kellogg. Kellogg, on the same first day of November, 1853, assigned the said bond and mortgage to the plaintiff, for \$6,250, paid therefor.

The defendants, by their policy of insurance, on the 14th of November, 1853, in consideration of \$32 ¹/₄, paid to them, as the policy states, by Eugene McCarty, insured the said "Eugene McCarty against loss or damage by fire, on his three story brick dwelling house," &c. * * * "loss, if any, payable to Seth Grosvenor, mortgagee," &c., from 12 o'clock at noon, of the 14th of November, 1853, to 12 o'clock, at noon, of the first of November, 1854.

The premises were partially consumed by fire, on the 24th of February, 1854. The loss, or damage, by the fire amounted to \$4,000. Notice of the loss, and preliminary proofs, were duly served. The latter were made out in the name of the plaintiff, as mortgagee, and were sworn to by him. He continued to own the bond and mortgage, and no part of the money, secured thereby, has been paid.

The defendants offered to prove, First, that, in June, 1854, Eugene McCarty sold, and conveyed, the insured property to Daniel Bostwick.

Second, That Eugene held the title for one John McCarty, that at the time of the fire, the property actually belonged to the latter, and that the two, and Bostwick, combined, and wilfully caused the premises to be set on fire, for the purpose of defrauding the defendants, and that such fire caused the loss now claimed.

Each of the offers was overruled, and to each decision the defendant excepted.

The complaint states that the defendants "did, on the fourteenth of November, 1853, insure the plaintiff, as mortgagee of the premises," &c.; also states the fact of the fire, that notice of it was given, the amount due to the plaintiff, as mortgagee, the service of the requisite preliminary proofs, and prays judgment for the amount insured.

Under the direction of the court, a verdict was found for the plaintiff, subject to the opinion of the court, at General Term,

upon a case to be made. The case to be heard at the General Term, in the first instance, with liberty to either party to turn the case into a bill of exceptions, or special verdict. Some of the conditions, annexed to the policy, are recited in the opinions delivered.

Daniel Lord and R. Goodman, for plaintiff.

I. The proof was sufficient, that the plaintiff was mortgagee, by proving the mortgage and the assignment, to himself, before the date of the policy. By the assignment, transferring the mortgage to the plaintiff, he was mortgagee of the property, and had a distinct and independent insurable interest in the building.

II. The policy, on its face, was an insurance to the plaintiff, as mortgagee, to the extent of his estate and interest in the property.

1. The policy recognized the two interests of mortgager and mortgagee, and insured both; the interest of the mortgagee was measured by the amount due him, and the premium, being paid by the mortgager, there could be no equitable subrogation of the insurer to the bond, in a case free of fraud or other equity. This was the mortgager's interest. (*Traders' Insurance Co. v. Roberts*, 17 Wend. R. 631.) Grosvenor, as mortgagee of the land and building, was entitled to the insurance, and to the building itself, to the extent of his mortgage. His beneficial interest in the contract of insurance, was expressed on its face.

2. The insurance was as available, to the mortgagee, as if made to Eugene McCarty, absolutely, and assigned by him, to the mortgagee, as collateral.

In each instance, the mortgagee derived title to the policy under the mortgager's appointment, and both, with the express consent of the company.

III. The conveyance, offered to be proved, to Bostwick, was irrelevant; such conveyance was no transfer of the interest of the mortgagee—the interest of the insured in the property. To operate a forfeiture of the policy, as to all the insured, the transfer must be of the interests of all the insured.

A transfer of Grosvenor's interest, would not forfeit McCarty's insurance, nor *vice versa*.

All forfeitures, and conditions of forfeiture, operating on inno-

cent parties, must be construed strictly, and strictly fulfilled, to operate such forfeiture.

IV. If the privity of Grosvenor, as assured, continued after the alleged transfer to Bostwick, then the acts of Bostwick, and of Eugene McCarty, were the acts of strangers to the insurance of Grosvenor. Their burning of the property, would have affected him no more than those of any other strangers to the insurance. (*Tillou v. Kingston Mutual Ins. Co.*, 1 Selden, 405.)

If the insurers might, in such case, claim subrogation to the bond of Eugene McCarty, on the equitable ground, that he should not avail, of his own fraud, to defeat a subrogation, such claims of subrogation are not available, against the mortgagee, as a defence. They can only be availed of, after a recovery, against the defendants.

Wm. Curtis Noyes and Jno. N. Taylor, for defendants.

I. A policy of insurance, by a mortgagor, does not enure to the benefit of a mortgagee, unless duly assigned to him. (1 Phil. on Ins. 3d ed. § 296; *Neal v. Reid*, 1 B. & C. 657; 1 Arnould, 250.)

II. Nor has a mortgagee any interest, as such, in a policy of insurance effected, by the mortgagor, in his own name. (1 Phil. on Ins. §§ 405 to 412; *Carter v. Rockett*, 8 Paige, 437.)

III. The policy, upon which this action is brought, was not issued to the plaintiff, and is no contract with him; but it is a contract with Eugene McCarty, as owner of the building—loss, if any, payable to plaintiff, who is described in the policy as mortgagee. Plaintiff was, simply, a trustee, to receive the money to which McCarty, as owner, would be entitled; and he could only recover upon McCarty's interest, and not upon his own, as mortgagee or otherwise. (*Macomber v. Cambridge Ins. Co.*, 8 Cushing, 133.)

IV. Since the policy was upon McCarty's interest, as owner, his conveyance of the premises, before the loss happened, as well as his wilfully causing the buildings to be set on fire, constitute a complete defence to the action. (*McLaren v. Hartford Ins. Co.*, 1 Seld. 151; *Clark v. N. E. Mu. Ins. Co.*, 6 Cush. 342.)

On pronouncing judgment, the Justices delivered their opinions, *seriatim*, as follows:—

WOODRUFF, J.—In my opinion, we ought to consider ourselves bound by the decision in *Robert v. The Traders' Insurance Co.*, (9 Wend. 404,) *S. C. in Error*, (17 Wend. 631.)

In that case, it is held, that when a policy of insurance is effected by a mortgagor, and the policy, with the assent of the insurer, is assigned to the mortgagee, a subsequent violation of the conditions of the policy, by the mortgagor, will not deprive the mortgagee of a recovery, for a loss thereafter occurring. And see the same point, in *Tillou v. Kingston Mutual Ins. Co.*, (1 Selden, 405.)

The present case involves no new principle, nor furnishes any just ground for a discrimination.

An assignment of a policy to a mortgagee, is, in effect, nothing more than an irrevocable power of attorney, to collect the amount of loss, if any shall happen, coupled with an interest in the assignee, greater or less, according to the extent of his interest in the subject of the insurance. Under the form of words of assignment, it is a direction, to the insurer, to pay such loss to the mortgagee.

When the assignment is made by the express consent of the insurer, the entire transaction amounts to this: the insurer insures the interest of the mortgagor in his premises, and agrees, upon certain conditions, to pay the amount of loss, if any happen, and then, by mutual consent, the *benefit* of this engagement (which is nothing more, nor less, than the right to claim whatever money may become payable, by reason of a loss,) is assigned to the mortgagee of the premises. In form, here is no relaxation of the conditions of the insurance, and it would be impossible to say, that, by the mere terms of the assignment, or the assent of the insurer thereto, the insurer thereby waived any qualification which was annexed to his liability before the assignment, or that the assignment, and the assent of the insurer thereto, were other than a consent, that if, according to the terms and conditions of the original contract, any sum of money should become payable, the right to receive the same should belong to the mortgagee. They do not, in terms, convert the policy into an insurance upon the interest of the mortgagee, nor modify the express terms of the contract, which states, by name, the person insured, and that the subject of the insurance is *his* property. And yet, in the cases above referred to, it is held, that such an assignment should be treated as, according

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to the plain intent of the transaction, a protection to the mortgagee, not liable to be affected, and defeated, by the subsequent acts of the mortgagor—not upon the ground that the transaction converts the policy into a mere insurance of the interest of the mortgagee, for, if that were so, then, according to the uniform course of decision in this state, the insurers, upon paying the loss, would be entitled to claim a subrogation to his position, and to collect the mortgage debt from the mortgagor, but, on the ground that the mortgagee has acquired such an interest, in the contract, as that, although it is an insurance, in the mortgagor's name, and upon his interest, and upon express conditions, which form an essential part of the contract, yet, after such assignment, it shall not be in the power of the mortgagor to destroy the contract itself, or defeat it. The Supreme Court, it is true, in 9 Wend., (475,) appear to regard the assignment, as producing the effect, to convert the contract into an insurance upon the interest of the mortgagee exclusively, but that is expressly disaffirmed, on the review, in the Court of Errors, (17 Wend. 637,) where it is said that the assignment gave the assignee the right to recover the damage sustained, if it accrued while he was the assignee; but such recovery, and the payment thereof, would have been applied to the benefit of the assignor, in discharge of his indebtedness, *pro tanto*: and the fact, that the assignor (mortgagor) paid the mortgage, did not enure to the benefit of the insurer, nor have any other effect, than to bring back to him that interest, in the policies, which he had assigned—that the assignment could not alter, nor vary the extent of the liability of the insurer, but the policies remained good, for their original purpose, to wit, “to pay the loss and damage, on the buildings, occasioned by fire,” not to the mortgagor, if it happened while the mortgagee held the policy, for the latter had an interest, and that interest, to the amount of the damage, the insurer had become liable to pay.

Nor does the doctrine proceed upon the idea that it is, in legal effect, a new contract of insurance in favor of the mortgagee, for, if that were so, then the mortgagee, in case of loss, might, upon common law principles, have maintained his action and recovered in his own name, whereas, it has often been held, that he can only sue in the name of the mortgagor, the assignor. (5 Wend. 200; 3 Denio, 254; 4 Hill, 187; 8 Id. 88.)

And it is proper to notice, that the arguments of the counsel

for the defendants in the case referred to, (9 Wend. 406,) proceed upon the same grounds which are now urged against the claim of the plaintiff herein, and, upon the same view of the nature and effect of an assignment of a policy as is taken, of a policy containing a clause, making the loss payable to the mortgagee, by Chief Justice Shaw, in the case which will be presently referred to.

Whatever doubts might be suggested of the correctness of the decision in *Robert v. The Traders' Ins. Co.*, it has been since so distinctly affirmed in the court of last resort, that it is not open to question here. See 2 Comst. 218; 1 Id. 293, and *Tillou v. The Kingston Mutual Ins. Co.*, 1 Sel. 403; in which last case, the principle stated is, that after an assignment of the policy with the assent of the insurer, no act of the assured shall impair the rights of the assignee. In the case of *Neve v. The Charleston Ins. Co.*, (2 McMullen, 237,) the same rule was sanctioned, to wit, that after an assignment of a policy, with the assent of the insurer, the assignee is entitled to recover to the amount of his interest in the policy, notwithstanding the assured had deprived himself of the right to recover by acts of fraud.

Although the cases above referred to, have not been called in question by counsel on the argument herein, it seems proper to give them some prominence in the consideration of the subject, for two purposes: viz., to show that the courts in this state have manifested a disposition to give effect to the transaction according to the plain intent of the parties: i. e., to secure to the assignee, (mortgagee,) the protection which it was the obvious intent of the parties, (insurers as well as insured,) that he should have, and that beyond the power of the assured to impair. And also, for the purpose of instituting a comparison between the principles said to be applicable to the present case, and those urged to defeat the recovery in those cited, which, it will be seen, are alike applicable to either.

In each case, the contract is with the mortgagor. He is the party insured, and the subject of insurance is his property, and the premium is paid by him. In neither case is there any express agreement by the insurer to pay any thing, unless events shall so happen, that the amount of the loss would, (according to the very terms of the policy, and under all the conditions and qualifications annexed thereto), become payable to the insured himself.

In each case, by the express assent of the insurer, the amount of loss has been made payable to the mortgagee, or in the language of Chief Justice Shaw, in the case mentioned below, the insurer has in effect "stipulated to pay to the appointee of the assured, when a loss should become payable, instead of paying to the assured himself," for this is the import of the assent given by the insurer to the assignment as above already suggested. In neither case is any interest less than that of absolute ownership expressed to be the subject of the insurance, and nothing in the transaction indicates that the interest of the mortgagee is regarded as the object of protection to any extent, except so far as that is to be inferred from the appointment made to him, in the one case embraced in the policy itself, and in the other, in the assignment.

In neither case do the terms of the policy, nor of the policy and assignment taken together, expressly declare that the interests of both mortgagor and mortgagee are insured, or that any loss is to be paid, unless the interest of the mortgagor be injured by fire. Neither an assignment of the policy, nor a provision in the policy, that the loss shall be paid to the mortgagee, does more, in terms, than designate a person to whom the loss shall be paid, if the same shall, according to the conditions of the policy, become payable. Nor is it more necessary to regard the one than the other as a conversion of the policy into a contract to insure the interest of the mortgagee, as such. It is sufficient to say, as has been said, and decided, in regard to an assignment, that, although, the policy is upon the interest of the owner, (the mortgagor,) the mortgagee acquires such a claim to or lien upon that insurance, as a collateral security for the payment of his debt, that no change or modification of that interest, or of the rights of such owner, shall destroy the mortgagee's claim.

To say that a stipulation, in a policy, making the loss payable to the mortgagee, gives the mortgagee a right to recover, under circumstances in which the mortgagor (the insured,) could not, is no more in conflict with the terms of the policy issued, than to say, that a mere assignment of the policy itself has that effect. In both cases, the insurance was primarily based upon the interest of the mortgagor, and the interest of the mortgagee is derivative only; and it is but in accordance with the plain intent inferrible from the whole transaction, to say, that the mortgagee has a lien upon

the contract, collateral to his debt, and as security therefor, which no subsequent act of the assured, or change of his interest, should be permitted to impair.

It may, perhaps, suggest our views of the correspondence of the two cases very clearly, to suppose that two plaintiffs (mortgagees,) come into court, each with a policy granted to their respective mortgagors, upon precisely the same terms and conditions, and as to each of which the same defences would avail, were the suits prosecuted by the mortgagors. One policy contains a clause in itself, declaring the loss to be payable to the mortgagee, and the other has an endorsement thereon, made contemporaneously with the execution of the policy, and with the consent of the insurers, assigning the policy to the mortgagee. May it not be asked, is there sound sense or reason in saying, that the right to recover is not alike in both cases? And, again, the provision being inserted in the policy, that the loss should be paid to the mortgagee, would his right or title have been in any wise improved or strengthened, if the mortgagor had superadded an act of assignment? It is not perceived that the latter act has any force or effect, that is not involved already, in the first-named provision. Certainly, when applied to other agreements for the payment of money, an assignment does no more than direct to whom it shall be paid, when it shall become due.

The case of *Macomber v. The Cambridge Mutual Insurance Company*, (8 Cush. 133,) relied upon by the defendant's counsel, is entitled to consideration. The clause upon which the plaintiff here relies, was contained in the policy in that case. Although the decision was placed upon a totally distinct ground, rendering it wholly unnecessary to express any opinion of the effect of this clause, yet Ch. Justice Shaw says, "The insurance was upon the interest of Bemis & Bemis, payable to Macomber, mortgagee, in case of loss. The insurance was not upon the interest of Macomber, but the undertaking to pay him was a collateral and derivative contract, growing out of the principal contract with the assured, by which the company stipulated to pay to the appointee of the assured, when a loss should become payable, instead of paying to the assured himself. The ordinary effect of such a contract between the three parties is, that if the assured, whose property and interest alone are covered, should alien before a fire, he

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would sustain no damage; there would be no loss for which the insurers would be responsible, and, therefore, the contingency upon which the appointee, by the terms of the contract, would have a right to claim, could not happen."

It has been already shown that the import of the undertaking, by the insurers, as stated by Chief Justice Shaw, is in all respects applicable to the consent of the insurers, given to the assignment of a policy to the mortgagee. The contract of the insurers with such mortgagee, implied in their consent to an assignment, is collateral and derivative, growing out of the principal contract with the assured, and constitutes the mortgagee the appointee of the assured to receive payment in his stead, when a loss shall become payable. And that the learned Chief Justice himself was of that opinion, and means to be understood as holding, that the rights of the mortgagee, whether claiming under such a clause in the policy, or claiming by assignment of the policy, are identical, appears by his opinion in *King v. The State Mut. Ins. Co.*, (7 Cush. 3, decided very shortly before the case above referred to,) in which he says, of the case in which a mortgagor insures, payable to the mortgagee, in case of loss, "In that case, it is the mortgagor's interest in the subject which is insured, with an irrevocable power of attorney; in legal effect, an assignment to the mortgagee, as additional collateral security, to receive the avails of the loss, if one happens." Again, he speaks of the insurance, in such case, as "an insurance of the interest of the mortgagor, by a contract with him, on a consideration made by him, and assigned to the mortgagee."

It need hardly be added that this opinion affirms the views already expressed, and the courts of this state having declared the legal effect of such an assignment to be, to entitle the mortgagee to recover, notwithstanding acts of the insured which might defeat a recovery by the assured himself, the opinions of Chief Justice Shaw become opinions in favor of the present plaintiff.

Nor does this view of the opinion of the courts of Massachusetts rest in a mere dictum. It will appear, on examination, that they are quite consistent on this subject, and do, in fact, regard such a policy as is now under consideration as the same, in effect, as a policy assigned to the mortgagee, and that the effect of such an assignment is just what is stated in the above opinion, in *Macom-*

ber v. *Cambridge Ins. Co.*, in direct contradiction to the decisions in this state already referred to.

In *Carpenter v. The Prov. Wash. Ins. Co.*, (16 Peters, 495, 501,) Mr. Justice Story declares his view of the rights of a mortgagee, under an assigned policy, in precise conformity with the dictum of Chief Justice Shaw, in 8 Cushing, thus: "If the mortgagor insure, and assign the policy to the mortgagee, with the consent of the underwriters, as collateral security, that assignment operates solely as an equitable transfer of the policy, so as to enable the mortgagee to recover the amount, in case of loss; but it does not displace the interest of the mortgagor in the premises insured; on the contrary, the insurance is still his insurance, and on his property, and for his account; and so essential is this, that if the mortgagor should transfer the property to a third person, without the consent of the underwriters, so as to divest all his interest therein, and then a loss should occur, no recovery can be had therefor, against the underwriters." Mr. Justice Barculo, in 7 Barbour, 575, very justly remarks, "That case has never been law in this state;" and the cases above referred to are sufficient to that point. But that case is, doubtless, deemed the law in Massachusetts, and the remarks of the Chief Justice, cited from *Macomber v. Cambridge Ins. Co.*, are to the same effect, and hence, also, the observation of the same distinguished Judge, in *Felton v. Brooks*, (4 Cush. 203,) where a policy had been assigned to a mortgagee, with the assent of the insurers, "It may be, that after the alienation of the estate," (by the assured) "to Rice, the policy was so far void, that no person had any longer an insurable interest in the premises, and, therefore, no loss could be recovered in case of fire," &c.

The cases cited are not the only examples of difference between our own decisions and those of Massachusetts, and we may not hesitate to decline following this dictum, when we find their courts also holding, in direct opposition to our own, that when a mortgagee insures his own interest, as mortgagee, he may, in case of loss, collect both the insurance from the insurers, and the debt from the mortgagor. (*King v. The State Mut. Fire Ins. Co.*, 7 Cush. 3.)

The right of the plaintiff in this case, has, moreover, the authority of the Supreme Court of Maine. In *Motley v. Manufacturers' Ins. Co.*, (29 Maine, 337,) lessors for a term of years, under covenant to keep the property insured, procured a policy,

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in which was inserted a stipulation thus: "in case of loss on the buildings, the same to be paid to Edward Motley, mortgagee." The court regarded that insurance as an insurance for the benefit of the mortgagee, and as protecting his interest, as well as that of the assured: in that respect, conforming to the decisions in this state respecting an assigned policy; but went even further, and held, that under such a policy, the mortgagee might maintain his action in his own name, a point not material now in this state, so far as it affects the form of the action, but of some importance, as showing how fully the contract created by such a policy was vested in the mortgagee.

And this case also notices a view readily suggested by a perusal of the pleadings and proofs herein, though not raised by the counsel for the defence, viz.: that it does not affirmatively appear that the clause, "loss if any, payable to Seth Grosvenor, mortgagee," was inserted in the policy in pursuance of any pre-arrangement or agreement, by which the mortgagee had a right to require such an insurance, or that the insurance was in fact made for his benefit with his knowledge or assent, or that the policy had been delivered to him before the fire. The insurance was, by its terms, and according to the views above expressed in legal effect for the benefit of the plaintiff, and so made, in terms of promise, by the defendants themselves, and in the case last cited, the court say: "It is sound doctrine, applicable to simple contracts generally, and the appropriate and well-established doctrine of contracts of insurance, that if one make a promise to another, for the benefit of a third, the latter can maintain an action upon it in his own name." (1 J. R. 139; 10 Mass. 287.)

Bringing this action is a sufficient ratification by the plaintiff of the act of procuring the insurance for his benefit. The plaintiff comes into court, proves his interest as mortgagee, and brings with him the policy on which his claim is founded; this is *prima facie* sufficient: it is quite enough to raise the presumption of delivery, according to the usual and natural course of business at or about the time of its date.

Although we might suppose counsel would deem it prudent to show, that in fact, (if it were true,) there was an agreement, that the premises should be insured for the benefit of the mortgagee—that he advanced his money upon that condition—and that this

policy was delivered at the time of such advance, or in pursuance of that arrangement. Still we think, that showing his interest, showing an insurance in form for his benefit, and the actual possession of the policy, and his bringing suit thereon, were *prima facie* sufficient.

Judgment should be ordered for the plaintiff for the amount of the loss, \$4,000, with interest, from the time when the loss was payable, (sixty days from the 10th of March, 1854,) with his costs of suit.

BOSWORTH, J.—Is this a policy insuring the plaintiff, as mortgagee; or is it a policy insuring Eugene McCarty, as owner of the property insured?

In terms, it is a contract between McCarty and the defendants. He is stated in it to be the party "insured," the property insured is stated to be "his," and the premium is recited to have been paid by him. The only clause of the policy referring to the plaintiff, is that which declares the "loss, if any, payable to Seth Grosvenor, mortgagee."

There is no evidence, except such as may be derived from the policy, tending to show, that the defendants were advised, when the policy was applied for, that the object of it was to protect the interest of the mortgagee, or that his interest as mortgagee was sought to be insured. Neither was any evidence given, except such as is furnished by the terms of the policy itself, that the plaintiff knew of the existence of the policy at the time it was effected, or prior to the loss; none certainly that it had been delivered to him prior to the loss, unless such evidence is furnished by the fact that he produced it at the trial, and by the terms of the policy.

Macomber v. Cambridge Fire Mutual Ins. Co., (8 Cush. 133,) was upon a policy, the body of which was, in terms, like that we are considering. In speaking of the nature and effect of the contract, irrespective of the rules and regulations annexed to, and forming part of the policy, Shaw, Chief Justice said: "The insurance was on the interest of Bemis & Bemis, payable to Macomber, mortgagee, in case of loss. The insurance was not upon the interest of Macomber; but the undertaking to pay him was a collateral and derivative contract, growing out of the principal con-

tract with the assured, by which the company stipulated to pay to the appointee of the assured, when a loss should become payable, instead of paying to the assured himself. The ordinary effect of such a contract between the three parties is, that if the assured, whose property and interest alone are covered, should alien before a fire, he would sustain no damage; there would be no loss for which the insurers would be responsible, and, therefore, the contingency, upon which the appointee, by the terms of the contract, would have a right to claim, could not happen. In general, the assured must have an insurable interest at the time of the damage by fire, as well as at the time of effecting the policy, in order to recover." If such is the true nature and effect of the contract created by the policy in question, the verdict ought to be set aside.

In the case last cited, there were annexed to the policy certain rules and regulations, which formed a part of it. They expressly stipulated, that no mortgaged estate shall be deemed to be alienated, until the mortgage shall have been foreclosed; and that any policy, payable to a mortgagee in case of loss, shall continue so payable, notwithstanding any subsequent alienation of the estate. Those rules, regulations, and the policy, together, constituted the contract.

No such rules and regulations, or conditions of insurance, nor any of equivalent import, are annexed to the policy in question. The third condition provides, among other things, that "if the interest in property to be insured be a leasehold interest, or other interest, not absolute, it must be so represented to the company, and expressed, in the policy, in writing, otherwise the insurance shall be void."

The fourth condition declares, that "policies of insurance, subscribed by this company, shall not be assignable, without the assent of the company, expressed by endorsement made thereon." The policy, in the body of it, states, that "the interest of the insured in this policy is not assignable, unless by consent of this corporation, manifested in writing."

Who is the person, and what is the interest insured? The defendants, in the language of the policy, did "insure Eugene McCarty," * * "on his three-story brick dwelling-house." He is, by the policy, declared to be the person insured, and the building

insured is declared to be his property. It is his interest, as owner, that is insured. No interest, less than that of absolute ownership, is expressed to be the subject of the insurance.

The plaintiff insists, that the policy recognized the two interests, of mortgagor and mortgagee, and insured both, and that the insurance was as available to the mortgagee as if made to Eugene McCarty, absolutely, and assigned by him, to the mortgagee, as collateral; that, in each instance, the mortgagee derived title to the policy under the mortgagor's appointment, and, in both, with the express assent of the company.

If both interests, viz., those of mortgagor and mortgagee, are insured, it is not because the terms of the policy so expressly declare. So far as its express terms state the contract of the parties, they state it to be an insurance of the property of Eugene McCarty, and that he is the person insured. The loss to be paid, if any, is a loss arising from an injury to that interest by fire. There is nothing, in the language of the policy, on which the court can adjudge, that, in legal effect, it is also a contract insuring the interest of the mortgagee, as such, except the provision which declares that the loss, if any, which accrues, under the contract insuring the mortgagor's interest, shall be payable to the mortgagee.

That provision merely designates the person to whom such loss is to be paid, and shows that he is a person who has an interest in its being so paid.

But a clause in a policy, insuring a person named, and his interest, as owner of the property covered by it, which declares that the loss, if any, shall be payable to a person also having an insurable interest, does not, *ex vi termini*, convert the policy into one upon the latter interest, nor in any way modify the express terms of the contract, which state, by name, the person insured, and that the subject of the insurance is his property.

This insurance cannot be as available to the plaintiff, as an absolute insurance of Eugene McCarty, and an assignment of the policy, with the assent of the company, to secure the mortgage debt, unless it is, in legal effect, an insurance of the mortgagee, as such, if it also be true that, after such an assignment, the assignee is as effectually protected, against all subsequent acts of the assignor, as he would be by a direct insurance upon his own interest.

We have no doubt, if this policy could be deemed a contract,

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between the plaintiff and the company, insuring the plaintiff, as mortgagee, that the acts of McCarty, which the defendant offered to prove, would be no bar to a recovery. The same result would follow, under the decisions made by the courts of this state, if it can be regarded as an insurance of the interest of McCarty, and equivalent, in legal effect, to an assignment by him of such interest, to the plaintiff, with the assent of the company, in conformity with the policy, and conditions annexed to and forming a part of it. (*Traders' Insurance Co. v. Robert*, 17 Wend. R. 631; *Tillou v. Kingston Mutual Insurance Co.*, 1 Seld. R. 405.)

But, for aught that appears, the plaintiff, if he knew of this policy, and was a party to its creation, was willing to receive such security, as a policy, on McCarty's interest, would furnish, with a provision that, if a loss occurred, for which the company would be responsible to McCarty, the amount of such loss should be paid directly to the plaintiff. He may not have thought there was the slightest risk that McCarty would do any act that could forfeit the policy.

If it is to be deemed to be an insurance of the mortgagee, as such, and of his interest alone, the company, on paying the loss, would be entitled to be subrogated, to the rights of the mortgagee, to the extent of the sum recovered.

But if it is to be deemed to be, what its terms declare, an insurance of Eugene McCarty, as owner, and a loss occurred, for which the company would be responsible to him, a recovery by, and payment to the plaintiff, of the amount of the loss, would confer on the company no such right.

It is insisted, however, that, whatever consideration these views might deserve, if the question were open to discussion, they are repugnant to decisions of the court of dernier resort of this state, upon the precise point on which this case turns. If this be so, they cannot be permitted to influence our decision.

I admit, that I cannot discriminate between the rights of a mortgagee, situated, with respect to an insurer, as the present plaintiff is, and those of a mortgagee, to whom a policy, in precisely the same words, has been assigned, with the express assent of the insurer, evidenced as the policy requires.

The Supreme Court, in the *The Traders' Insurance Co. v. Robert*, (9 Wend. 404-409,) did decide, that an act, done by the mortgagor, after an assignment of the policy to his mortgagee, with the assent

of the insurer, would not avoid the policy, although it was an act which, by the express terms of the contract of insurance, would have put an end to it, if it had not been assigned. It is difficult to perceive why, that decision does not, in effect, declare that such an assignment modifies the original contract. That decision seems to have been based upon the idea, that, "after the assignment of the policy, Robert, in whose name it was originally taken, had no interest in it, and this was known to the defendants." * * * "The rights of the parties are the same, as if the policy declared on, had been given to Francis Bolton, after the mortgage was executed to him." * * * "The question presented is precisely the same, because, under the circumstances of this case, the assignee, Bolton, is entitled to the same protection, from this court, as if the policy stood in his name."

This, in effect, decides, that after the assignment, with the assent of the company, the policy and the assignment, with such assent, together, in legal effect, became a contract of insurance between the insurer and the mortgagee, and that the insurance was thenceforth upon the interest of the mortgagee, as such. (*Traders' Insurance Company v. Robert*, 9 Wend. 474.) If such is the settled rule in this state, the plaintiff is entitled to recover.

The same case subsequently came before the court for the correction of errors, on appeal from an order of the Supreme Court, staying all further proceedings on the judgment, which order was made, because it was shown to the court, that after the judgment was recovered, the assignee had obtained payment of the moneys due him, by a foreclosure of the mortgage.

Robert v. Traders' Insurance Co., (17 Wend. 631,) the only reported opinion, of the reasons on which the judgment of the latter court proceeded, presents views directly opposed, on some points, to those of the Supreme Court, as to the effect of the assignment upon the original contract.

In that opinion, it is said, that had the company, at the time the policies were executed, "designed them for Bolton, they would have made him, instead of Thomas Robert, the principal." (Id. 637.) "I readily concede, that had the case shown that the policies were given to Bolton, to secure him the payment of his mortgage, the payment of the mortgage would have released the company from their liability, for that would have put an end

to the risk ; the payment of the mortgage, in that case, being the only thing insured." (Id. 639.)

These views, if sound, favor the idea, that this policy, whatever may be the clear meaning of its terms, was, from the time it was executed, an insurance of the interest of the mortgagee, as such. But the judgment of the court did not render it necessary to declare the rule applicable to such a state of facts, for in the same opinion it is expressly stated, that there was not enough in that case to show that the execution of the policies, and of the assignment of them, were concurrent and simultaneous acts; and that the court must construe the policies as it found them, "insurances of Thomas Robert, to whom the declaration avers they were delivered, and an engagement, on the part of the company, to pay the loss or damage, to him, his executors, administrators, or assigns." (Id. 637.)

That his assignment of them, with the assent of the company, did not give Bolton an absolute indefeasible interest in them, but "only a collateral interest, liable to be divested whenever Robert paid the mortgage; and when the company consented to the assignment, they consented to it for the purposes for which it was made, and this consent gave him the right to thus use it, but this could not alter or vary the extent of the liability of the company.

If the extent of the insurer's liability, under the policy, was the same after the assignment as before, then it is difficult to comprehend, why the doing of acts, which, by the express terms of the contract so assigned, were to put an end to it, and to all liability under it, should not be allowed to have that effect, although done after the assignment was made.

The argument of the Supreme Court, in *The Traders' Ins. Co. v. Robert*, (9 Wend. 409,) was this:

"Had the nominal plaintiff, in this case, executed a release to the insurance company, it would have had no effect upon the rights of the assignee; and if he could not directly discharge the right of action which he had assigned, surely he cannot do it indirectly."

The head of Equity Law, relating to the equitable rights of an assignee of a contract, after notice to the obligor or promissor, is here summarily ignored, and an assignment of a contract, by the

promisee, or covenantee, is converted into a contract between the promisor and covenantor and the assignee, and that, too, merely by force of the mere fact of an assignment, with notice.

The assent of the company to the assignment is necessary, only for the reason, that, by the terms of the contract, an assignment, without such assent, avoids the policy; and if the policy contained no such clause, an assignment to a party having an insurable interest, and notice of it to the company, would deprive the assignor of all power to release the right of action he had assigned, by executing a release to the company. Would it, therefore, follow, that because he could not thus avoid the policy, to the prejudice of the rights of his assignee, that the nature of the contract had been changed, and the insurer's liability essentially varied?

After an assignment of a contract, and notice of the assignment to the other contracting party, or after it has been made, with the assent of the latter, in cases in which such assent is indispensable to its continuing validity, it is well settled, that no dealings between the original parties to the contract, as payment by the one, or a release by the other, will be permitted to defeat or prejudice the equitable rights of the assignee.

But why all liability of the insurer, under it, should not be determined by acts done by the assured, without the knowledge or participation of the insurer, and against his will, and in fraud of his rights, which, by the express terms of the contract, were to be avoided or omitted, as indispensable conditions to its continuing obligation and validity, is not easily perceived. In a word, on what principle is it, that the mere fact of the assignment of a contract, by one party, with the assent of the other, alters the nature, and legal effect, of the contract itself? divests it of conditions forming an integral part of it, and converts it into a contract between new parties, in relation to new interests, and with new conditions as to continuing liability?

And yet, notwithstanding the opinion states, that the extent of the company's liability was not altered, or varied, by the assignment to Bolton, the court held, that a judgment, recovered by the assignee against the company, could be enforced by Robert, for his own benefit, after he had paid the mortgage debt, although he had done acts which would have been a bar to a recovery, in an action brought for his own benefit, if the policy had never been assigned.

This rule would make an assignment of the policy alter the nature and legal effect, of the contract, as between the original parties, and enable the assured to recover for a loss, after having done acts, which would be a bar to any action by him, if no assignment of the policy had been made. "The judgment," the opinion states, "was in the name of Robert, and the payment of the mortgage brought back to him the whole interest in the judgment, as effectually as it could have been done by an assignment, had one been drawn up and executed in due form, even had that payment been made voluntarily on the part of Robert." * * * *
"Robert having been compelled to advance the amount of the judgment on the mortgage, did not thereby subject himself to have the same defence set up against him, by way of avoidance, which might have been set up, had he continued to be the owner of the policies." (Id. 640.)

Assuming these views to be sound, then it follows that the plaintiff is entitled to judgment on the verdict, and that if the plaintiff, before issuing execution, forecloses his mortgage, and collects his mortgage debt, McCarty might then have execution issued, and collect the judgment for his own benefit, if he continued owner of the insured property, although he may have fraudulently set the insured premises on fire, with a view to charge the defendant with the amount of the loss. If a defence may not be set up against the assured, and made available as a ground of relief against paying the judgment to the mortgagor, and for his benefit, which the contract expressly provides should exonerate the company from all liability to him, it is not apparent how a fraudulent burning of the premises would prevent him from enforcing the judgment, if he should be compelled by the plaintiff to pay the mortgage, before the judgment is collected.

The latter case, it is true, would be one of such gross fraud, that no court would willingly omit to do anything it could properly do, to prevent his enforcing the judgment, for his own benefit, under such circumstances.

But, in the case of *Robert v. The Traders' Insurance Co.*, the court did certainly go so far as to hold, first, that a certain act done by him, after the policy was assigned, which, by the express terms of the contract, would have avoided it, and barred a recovery, had no assignment been made, presented no defence to an

action by the assignee. And, second, that the collection of the mortgage debt, out of the mortgaged property, the premises insured, by the assignee, after the judgment was rendered, entitled the mortgagor, even under such circumstances, to collect the judgment from the insurer, for his own benefit.

The first of these points is sufficient to entitle the plaintiff to a judgment on the verdict. In addition to an express adjudication of that point, by the court for the correction of errors, the Court of Appeals seem to have made a decision to the same effect, in *Tillou v. The Kingston Mutual Insurance Co.*, (1 Seld. 405.)

The unqualified language of the opinion, in both cases, is that "no act of the assured, after the assignment of the policy, with the assent of the insurer, shall impair the rights of the assignee."

If this policy contained no clause making the loss, if any, payable to the mortgagee, and the policy, with the assent of the company, had, on the day of its date, been assigned to the plaintiff, he would be entitled to recover, on the authority of those cases. Instead of being able to discriminate between the cases, with any advantage to the insurer, the reasoning, in the opinion of the court, in *The Traders' Insurance Co. v. Robert*, requires us to regard the plaintiff's right to recover, in this case, less questionable, than upon such facts as that case presented.

In the case of the assignment of a policy to a mortgagee of the assured, with the assent of the company, the loss, by force of the assignment, is made payable to the mortgagee. In the present case, it is made payable to the assignee, by the terms of the policy itself.

In the former case it is so made payable by the act of the assured, to which the assurer assents, which assent is evidenced by an endorsement on the policy. In the latter case it is so made payable by the act of the assured, in procuring a policy which, by its terms, directs the loss to be paid to the mortgagee, and the insurer assents to it, by engaging, as a part of the contract itself, to pay the loss to him.

Whatever effect may be given to the assignment to a mortgagee, because executed with the assent of the insurer, should be given to a policy containing the provision in question. It is as transparent in the one case as in the other, that the object in view was the protection of the mortgagee, and to the same extent in each case.

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If, in the former case, it must be presumed that the assignment was made and assented to, to secure the mortgagee to the extent of his interest, and, therefore, the court will make the transaction protect him to that extent, the presumption is equally strong in a case like the present, and the duty of the court as clear.

In the present case, it was a part of the contract of insurance itself, that the loss, if any, should be paid to the mortgagee. Thus, some intrinsic evidence is furnished that the policy was sought and granted, to protect the mortgagee, as its first and primary object. No such inference can be drawn with respect to a policy assigned to a mortgagee weeks or months after it was issued. In this respect, the claims of the plaintiff to protection are stronger than those of the plaintiffs in the cases referred to, and which we regard as controlling, if any discrimination is to be made between them.

Regarding those decisions as conclusive of the present plaintiff's right to recover, it follows that he must have judgment for the amount of the verdict, with interest from the time when the loss, by the terms of the policy, became payable.

Judgment was ordered accordingly.

WILLIAM NELSON, WILLIAM NELSON, Jr., and AARON COHEN,
v. GEORGE S. STEPHENSON.

Molasses was shipped, under an ordinary bill of lading, expressing that six hundred and twenty-four barrels of molasses, marked, &c., "were shipped in good order and condition, to be delivered in like good order and condition in New York," freight payable "for the said molasses at the rate of 8½ cents per gallon, gross gauge." At the foot of the bill of lading were the words, "Contents and gauge unknown."

The vessel sailed, with the six hundred and twenty-four barrels of molasses on board. Eight of them were delivered empty, not containing any molasses.

It was stated, as part of the case, "that all the said barrels of molasses were well and properly stowed, and none of the molasses in the said eight barrels was lost by the perils of the sea, nor by any negligence or want of care on the part of the owners of the vessel, their agents, or servants; but whatever molasses was lost from the said eight barrels, which were empty at the time of the delivery thereof, was wasted or lost solely by, or in consequence of, leakage, fermentation, or inherent waste."

In an action for the freight of these eight barrels, by the ship owners,—

Held, that the plaintiffs were entitled to recover.

That the owner of liquids, or of any articles shipped in casks of any description, is, in the first instance, charged with the duty of supplying proper ones, and would be presumptively responsible for a loss arising from their insufficiency or defects.

That the effect of an unqualified bill of lading is to transfer this presumptive responsibility to the captain and owners of the vessel.

When the case presents no other facts, if the casks be delivered empty, or nearly so, and the actual cause of the loss or diminution be unknown or conjectural, the owners of the vessel lose their freight. A proportion of the freight would also be lost for any number of the casks delivered empty, as well as for any portion of the contents of any cask leaked out. The loss, in such cases, is legally attributable to the defect of stowage, or to some cause over which the master had control, and for which he has engaged to be responsible.

As, however, a bill of lading, treated as a receipt, is not conclusive, it is open to the ship owner and master to prove explicitly that the casks were in fact unsound, or badly made; and in such a case the original responsibility of the owner for their condition is restored, and he is bound to pay the freight.

A bill of lading may be so qualified as to avoid any acknowledgment of the good order of the casks, or the quality or quantity of the contents. The doctrine of the French law stated upon this point.

The phrase "contents unknown," in this case, should not be interpreted as negating the admission that the casks contained molasses; but only negating an admission of the quantity or quality of the article.

(Before OAKLEY, CH. J., HOFFMAN and SLOSSON, J.J.)

May term, 1856.

THE case was submitted, without an action, under the 372d section of the Code, and is as follows:—

William Nelson, William Nelson, Jr., and Aaron Cohen, were, at the several times hereinafter mentioned, owners of the ship or vessel called the *Pacific*, sailing between the port of New Orleans, in the State of Louisiana, and the port of New York, in the State of New York, and employed in the carriage of goods and chattels, for reward, between those ports.

On or about the 29th day of November, in the year 1855, the said vessel, then lying at the said port of New Orleans, and destined on a voyage to the port of New York, one C. Huntington shipped on board of the said vessel six hundred and twenty-four barrels of molasses, to be therein carried from the port of New Orleans to the port of New York, for the freight, and upon the terms contained in a bill of lading, signed by the master or purser of the said vessel, and delivered to the defendant, of which the following is a copy:—

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"Shipped in good order and well conditioned, by C. Hunting ton, on board the good ship Pacific, whereof Gadd is master for the present voyage, now lying in the port of New Orleans, bound for New York, to say: Six hundred and twenty-four barrels of molasses, marked and numbered as in the margin, and are to be delivered in the like good order and condition at the port of New York, all and every, (the dangers and accidents of the seas and navigation of whatever nature or kind excepted,) unto G. S. Stephenson, or to his assigns, he or they paying freight for the said molasses at the rate of $8\frac{1}{2}$ cents per gallon, gross gauge, with five per cent primage and average accustomed.

"In witness whereof the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenor and date; one of which being accomplished the others to stand void."

Contents and gauge unknown.

NEW ORLEANS, the 29th day of November, 1855.

The said vessel soon thereafter set sail for the port of New York with the said six hundred and twenty-four barrels of molasses on board, and arrived at the said port of New York on or about the 24th day of December, in the year 1855, and thereupon the same, with the exception hereinafter mentioned, were, in pursuance of the said bill of lading, delivered to, and were received by, the said George S. Stephenson, the consignee in the said bill of lading named, but of the said barrels, so delivered to and received by him, were eight which were empty and did not contain any molasses.

All of the said barrels of molasses were well and properly stowed, and none of the molasses in the said eight barrels was lost by the perils of the sea, nor by any negligence or want of care on the part of the owners of the vessel, their agents or servants; but whatever molasses was lost from the said eight barrels which were empty at the time of delivery thereof, was wasted or lost solely by, or in consequence of, leakage, fermentation, or inherent waste.

The gross gauge of the said eight barrels was three hundred and twenty-nine gallons; and the said George S. Stephenson claimed that neither the shipper, owner or consignee was liable to pay the freight and primage thereon, amounting, according to the above measurement, to the sum of twelve dollars and nine cents,

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and the barrels were all received by him with the understanding and agreement that the receipt thereof should be without prejudice to the claim so made by him, and that the shippers, owners, and consignee's rights should be the same as if the said eight barrels had been abandoned to the owners of the said ship by the shipper and owner of the goods, he being at the same time consignee; and that if the shipper, owner or consignee would be liable to pay such freight and primage, notwithstanding the abandonment, that he, the said Stephenson, would pay the same.

The question of difference, and the controversy, between the parties is whether, on the facts as herein stated, the said shipper, owner or consignee is liable to pay, and the owners of the ship are entitled to receive, the freight and primage on the said eight barrels, amounting to the said sum of twelve dollars and nine cents. If the decision is in favor of the owners of the ship, judgment is to be entered against the said George S. Stephenson for the last mentioned sum.

Judgment is to be entered according to the decision of the court, without costs, it being understood that in any event each party shall pay his own costs.

WILLIAM NELSON, JR.,
For owners of the ship.
GEO. S. STEPHENSON.

City and County of New York, ss.

William Nelson, Jr., and George S. Stephenson, being duly sworn, do depose and say, and each for himself says, that the foregoing case subscribed by them contains the facts upon which the controversy between the parties therein named depends; that the controversy is real and the proceeding is in good faith to determine the rights of the parties.

WM. NELSON, JR.
GEO. S. STEPHENSON.

Sworn to this 18th day of Feb., A. D., 1856,
Before me, G. E. BALDWIN, Commissioner of Deeds.

C. Jones, for plaintiff.

H. D. Gram, for defendant.

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BY THE COURT. HOFFMAN, J.—There are two points of view to be taken of this case: one—and it is that principally argued by counsel—arises upon the general law, irrespective of the particular language of the bill of lading in this instance; the other depends upon the true construction of that language.

In the first aspect, the question raised is this: If a liquid (molasses) be shipped in hogsheads, under a bill of lading, in the usual form, viz., for the delivery of so many hogsheads of molasses, and the casks be well stowed, and without perils of the sea, or fault of the ship-master or owners, some of the casks be found empty, from leakage, is freight payable for such empty casks?

It is said, under the second view of the case, that there is here no engagement, except to give so much share in the ship as the barrels would occupy, whether filled with molasses, with sea-water, or empty; that, although the freight is to be computed as if they were filled to the brim with molasses, yet it is earned, if the barrels only are delivered.

It is also insisted, and the observation appears to be warranted, that this first question has not been decided, in our own tribunals, nor in those of England.

Chancellor Kent, in his Commentaries, (vol. 3, p. 226,) says: "If casks contain wine, rum, or other liquids, or sugar, and the contents be washed out, and wasted and lost by the perils of the sea, so that the casks arrive empty, no freight is due for them; but the ship-owner would still be entitled to his freight, if the casks were well stowed, and the contents were essentially gone, by leakage or inherent waste, or imperfection of the casks."

Apparently, the last clause of this proposition is directly opposed to the last clause of the 310th article of the Commercial Code of France. The whole article is this: "The merchant cannot abandon, for the freight, goods which are diminished in value, or damaged, from defect or by accident. If, however, casks, containing wine, oil, honey, and other liquids, have leaked out, so much that they are empty, or nearly empty, such casks may be abandoned, for the freight."

Chancellor Kent cites, in support of his proposition, Molloy, (b. 2, c. 4, § 16,) and *Frith v. Barker*, (2 John. Rep. 327.)

What Molloy states, as a positive rule, is, "that if one hundred tons of wine are freighted, and twenty leak out, so that there is not

above eight inches from the bung upwards, yet the freight becomes due. One reason is, that, from that gauge, the crown becomes entitled to custom. But, if they be under eight inches, by some, it is contended to be in the election of the freighters to fling them up, to the master, for the freight, and the merchant is discharged. But most conceive otherwise; for, if it had all leaked out, and if there were no fault in the master, there is no reason that the ship should lose her freight, for the freight arises from the tonnage taken."

Prith v. Barker settled that, if a portion of a cargo of sugar was washed out, by reason of the perils of the sea, so that some of the casks arrived empty, no freight is payable for such empty casks. Bringing into port the empty hogsheads, is not bringing the hogsheads of sugar, which the owner of the vessel had undertaken to do. The goods no longer exist. "This opinion," says Chief Justice Kent, "is strictly confined to the facts of this case, which establish that the sugar was entirely gone, by the perils of the sea, before the arrival of the vessel in port. It will not, therefore, apply to the case of an article that is lost, by other causes than the perils of the sea, such as internal decay, leakages, evaporation, and the like."

Clearly, therefore, the court left such a case uncontrolled by the opinion and judgment, and open, in like manner, as it had left nearly the same question, stated in the first sentence of the opinion. So the reporter understood the subject, as he puts the proposition in the shape of a query.

Griswold v. The New York Insurance Co., (3 John. Rep. 321,) has also been referred to by counsel. It settles that, if the goods be delivered in specie, however deteriorated, freight is earned.

In *McGaw v. The Ocean Insurance Co.*, (23 Pick. 412,) when the case of *Griswold v. The New York Insurance Company* was first before the court, (1 John. Rep. 212,) Mr. Justice Livingston cogently argued against the right to abandon for freight; but we are to observe, that it was the case of goods greatly diminished in value, yet capable of being delivered in specie, which he was discussing.

Nor is there any thing decisive, upon this particular question, in the English law. Mr. Abbott, after citing the remarks of Valin, and of Pothier, observes, "that the argument of the latter may show what ought to have been established, but it by no means proves that the interpretation given by Valin is not the true interpretation of the ordinance. The rule was probably introduced in

early times, to prevent disputes and litigation, and adopted by the framers of the French ordinance for the same reason."

The supposed decision of Lord Mansfield, in *Luke v. Lyle*, (Barr. 886,) may be considered as inaccurately reported, or not the law, if applied to a port of destination. Mr. Abbott concludes that, in point of practice, the right to abandon, for freight alone, is never claimed in England. Mr. Abbott is, obviously, of opinion that there is no general right of abandonment; but, in this particular case, he cites nothing more to the point, than the passage from Molloy I have before quoted.

In such a state of the law, in England and our own country, when there is, at best, but the opinion of eminent writers, and nothing of judicial authority, we are at liberty to resort to the foreign law for light and aid, if not for direction.

The whole subject is carefully examined, and the opinions of the eminent writers discussed, by Boulay Paty, (*Droit Commercial*, tome 2, p. 492.)

After stating the rule, that merchandise, delivered in specie, can not be abandoned for the freight, however much it may be deteriorated, he observes: "But there is another case, in which the merchant may abandon his goods, for payment of the freight; it is where the casks, containing liquids, have leaked so much as that they are empty, or nearly empty. (Tome 2, p. 492.) He then cites the *Guidon de la mer*, which is express to this proposition, and enumerates molasses among the articles; also the Ordinance of the Marine of 1681, equally explicit, and the Code of Commerce, (article 310,) before cited.

He then speaks of the comments of Valin, and other writers, upon the inconsistency of permitting such an abandonment for liquids leaked out, and not allowing it for dry commodities which have diminished in value. That some of the juriconsults have attributed this distinction to the greater probability, and, therefore, legal presumption, that liquids have leaked from the fault of the captain or crew. M. Loere gives this explanation; M. Valin does not find it satisfactory.

Pothier's comments on the ordinance are as follows: "The casks in which liquids which have leaked have been contained, are but the accessories and coverings of the merchandise. The merchandise is the liquid contained in them. If the casks be

empty, the merchandise no longer exists, and the master has not transported it to its place of destination; nor, of course, fulfilled his obligation. The freighter may then abandon the casks and the remnants, and discharge himself. But, in the other case, the merchandise exists, however damaged. It has been transported, the engagement fulfilled, and the freight is due." (Pothier, *Charte-Partie*, N. 60; M. Delvincourt, tome 2, p. 293.)

Again, Pothier, in discussing the question whether, in the case of some barrels nearly empty, and some full, the abandonment may be of the former only, or must be of all, speaks of the empty casks as perished merchandise; the barrels are lost when they are empty, or almost so. And another writer, M. Boucher, speaks of such a loss by leakage as the same thing as a loss by shipwreck.

Boulay Paty then examines the question, which he says has been greatly controverted, whether, if the leakage takes place without the fault of the captain, nor by superior force, nor by accident, but from the defect of the casks—their bad condition—the freighter shall be discharged of freight upon abandoning. Valin insists that the letter of the law makes no distinction; and even in this case, the abandonment may be made. M. Delvincourt supports the same opinion, on the ground that the captain was bound to assure himself of the good condition of the casks before he undertook to convey them.

Pothier opposes these views with great decision and strength of argument. M. Boulay Paty agrees fully with him, and adds this important practical proposition: "So that if the captain proves, as well by experts as by witnesses, that the casks were in a bad condition at the time of the shipment, and that the leakage has been the inevitable result of this, he may demand his freight."

The authors of *The Dictionnaire de Droit Commercial*, 1852, Gouget et Merger, state the rule thus: "This article (310) is not applicable to the case of leakage arising from the bad condition of the casks. The freighter who does not enjoy his goods from his own fault, cannot be relieved from the price of conveying them. The captain is responsible for stowage, but not for the state of the casks." They cite Pothier, Boulay Paty, Favard, Sebirne et Carbet, *contra*, Valin and Delvincourt, (vol. 3, p. 269.) Favard's authority is found in his *Dictionnaire Tit. Charte-Partie*.

M. Boucher discusses this subject with much justice of reason-

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ing. "A captain cannot prevent an article from perishing or being injured from its proper use. He is, therefore, paid his freight in such a case. But he is to be treated as able to prevent loss by a leakage, especially if he have declared that he received it in good order, by his bill of lading. We may, therefore, attribute a leakage to bad stowage, which he is bound to superintend. One hog-head leaks more than others from one of two causes: either from its worse condition, or from worse stowage. He is not at liberty to assert the former. The latter may not, indeed, be treated as actually proven; but, inasmuch as it is a just presumption, he is to be discharged from the loss, but obliged to take the cask and the remnant for his freight." (*Institution du Droit Maritime*, Paris, 1803, p. 289.)

The authority of the *Consolato del Mare* is, perhaps, of more importance upon this point than any in the French Law. Mr. Duer observes, that "as early as the 11th century, and during a succession of the years that followed, it was received and obeyed as law by all the nations of southern Europe. Indeed, unless a change has recently occurred, the rules of the *Consolato* have still the force of law in the tribunals of Italy, and, I believe, of Spain." (1 Duer on Ins., p. 37.)

The 202d chapter of that treatise is as follows: "Any ship-master whose vessel has been chartered by merchants, and about to be loaded with wine, he being obliged to furnish the merchants with hogsheads for the cargo of the ship, should proceed in the following way. He must cause the hogsheads to be cleaned and filled by his sailors, or by whomsoever he may choose, before placing them in his ship; and thus filled with water, he must show them to the merchants, or to some person for them, and ask, or cause to be asked, of those merchants who are there, whether these hogsheads appear to them good and sound, and whether they wish that he should put them in his ship; and if they, the merchants, or person acting for them, say that they consider them good and reliable, and that he may put them, or cause them to be put in the ship: then, if the merchants shall fill them, or cause them to be filled with wine, after they shall be stowed in the ship; and if then, any quantity of the wine which they shall put, or cause to be put in these hogsheads, shall escape, or shall be spilt, the master of the ship shall not be held responsible, or obliged to make good the

loss, because it is not his fault; and still more, because he showed the casks to the merchants, filled with water, and with their consent, or that of the person acting for them, put them in the ship, they, or the person acting for them, having considered them in good condition, the merchants, therefore, are obliged to pay the full amount of freight which they had agreed upon, as well of the wine spilt as of that which shall remain, because it has not been spilt or lost through his fault. If, however, the master of the vessel being obliged to furnish the hogsheads, as above mentioned, and if neither he, nor any person acting for him, shall show them to the merchants, or to any person for them, and without their consent, or that of the person acting for them, shall put them, or cause them to be put in the ship, if the merchants shall sustain any loss, on account of these casks which shall not have been shown to them, the master of the vessel is bound to make good the loss, and the merchants shall not be obliged to pay the freight of the wine which shall have been lost, because the hogsheads were not shown to them, that they might decide whether they were good or not. If, however, the master of the ship shall not furnish, nor shall be obliged to furnish hogsheads for these merchants, who have chartered the ship, and the merchants shall have had hogsheads from which all or part of the wine may have been spilled, the merchants are obliged to pay the freight of all which they may have placed on the ship, according to that which they shall have agreed upon without dispute." (Edition of Venice, 1806.)

The comment of Casaregis is as follows:—"Any vessel being chartered to carry wine, the master of that vessel, if he be obliged to provide the merchants with hogsheads or with casks, before loading them, should clean them, fill them with water, and show them to those by whom they are to be approved. In case they should be overturned, the loss will fall upon the merchants, and there will be due no more, nor less, to the master than the freight of all the wine, whether saved or lost. But the master not using the above-named precautions, should pay the loss; nor can he claim any thing but the freight of the wine saved. But this ceases when the merchants shall have provided the hogsheads themselves; they should, in that case, bear the loss themselves, and pay all the freight to the master, according to agreement.

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In relation to this chapter, read *II Tury. Juris. Marit.* cap. 43, num. 5.

It appears to have been the custom in the Mediterranean, for the owner of the ship to supply casks in which the wine was shipped.

Thus the payment of freight depended upon the fact of who furnished the casks. If the ship-master, he was responsible for their good condition, and lost his freight in case of leakage; if it was the merchant, his was the duty to supply suitable casks, and he was bound to pay the freight.

It will be observed, that the French writers lay much stress upon the obligations imposed by the bill of lading; and the subject cannot be fully considered without adverting to the law as to those obligations.

The *connaissance*, or *police de chargement* as it is termed on the shores of the Mediterranean, is the bill of lading of the English law. M. Lescadlier, (*Vocabulaire des Termes Maritimes*), thus translates it.

The French Code, as well as the old ordinance, prescribes the form of this instrument. It must express the nature and quantity as well as the species or qualities of the articles, the name of the ship's consignee, master, price of the freight, places of departure and destination, and is to exhibit, in the margin, the marks and numbers of the articles to be transported, (*Code de Commerce*, art. 281; Ordinance in Emerigon, p. 253, Meredith's translation.) It then becomes legal evidence between the parties interested in the shipment, and between them and the insurers. (*Ibid.*)

The foreign writers point out the responsibility which such an instrument imposes upon the captain, and therefore upon the owners of the ship. In the language of Boulay Paty, the effect of the bill of lading obliges the captain who signs it, to deliver the merchandise of the same quality, of the same quantity, of the same kind, and in the same condition as he received it, except those losses which it suffers in the voyage by the perils of the sea without his fault. This guaranty, or admission, is indeed only as to the generic nature, exterior and apparent, of the articles. As if sugar is mentioned, it is necessary to deliver the same number of casks with the same marks as those specified. But the specific quality is not contracted for. (Vol. i., 408, 409; vol. ii., p. 308.)

Pothier also observes, that the bill of lading duly executed,

is an admitted proof of the quantity of goods laden on board the ship.

This rule of the French law does not appear to be more stringent than that which prevails under the English and American decisions. Thus it is stated in *Bates v. Staunton*, (1 Duer, 85):—"The bill of lading, it is true, contains an admission of the ownership of the goods, and also an admission of their actual shipment, and of their sound condition. It appears, however, to be settled, that in neither of these cases does the admission operate as an estoppel. It is strong *prima facie* evidence of the truth of the facts to which it relates, but not conclusive."

In *Warden v. Greer*, (6 Watt's Penn. Rep. 424,) the court say: "Some difficulty arose as to whether the owners could contradict the bill of lading. This is not generally permitted, but cases may occur in which it may be proved there was an imposition on the captain, or a mistake of both captain and consignor. Suppose he receive a barrel of cider instead of Madeira wine, it would seem his bill of lading would not, and ought not, to exclude him from proving this, whether it arose from mistake or fraud in the consignor. But it would unsettle every thing, to permit a captain to receipt a bill for one hundred barrels of molasses, and at fifteen hundred miles distance, prove by his hands, that the barrels were not half full, or to receipt for them as in good order, and prove that they were in so bad order as to leak a gallon or a quart an hour."

To guard the master and owner against a liability so comprehensive and rigorous as the letter of the bill of lading imposed, the French merchants introduced clauses into that instrument, which were meant to restrict it; and which have received judicial interpretation. The phrases usually employed, are: "*sans approuver*," or "*que dit être*." The import of them is, that the articles are thus represented by the merchant, not thus recognized and admitted by the master.

The captain thus relieves himself from any engagement as to the weight, measure, or quality of the goods; every thing, in short, which is interior. He does not discharge himself from liability for the number of bales, cases, or tons, (Boulay Paty, *Droit Commercial*, tome i., p. 408, 409.) Emerigon cites several

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cases to illustrate the force of this clause. (Meredith's Translation, p. 268.) A bill of lading was for a bag of pepper, weighing so much, with this clause. The captain was deemed not responsible for a deficiency of weight. And, in one case, when a barrel, stated to be filled with nutmegs, was found full of pieces of old iron, the captain was discharged.

But this clause does not relieve the captain from responsibility for the number of casks, bales, &c. He was held answerable, in one adjudication, for a missing bale of cotton, notwithstanding the clause. The effect of the clause is done away, if the captain needlessly open the bales or casks, during the voyage. And the clause cannot be effective, when the goods shipped belong to the captain, who is the agent to purchase them. In short, the tenor of the French decisions and interpretations is, to limit the effect of the qualification in question, upon the general responsibility of the master, to a strict adherence to what the qualification relates to, and necessarily implies.

The bill of lading, in the case of *Clark v. Barnwell*, (12 Howard's U. S. Rep. 283,) was similar to the one in the present case. It was in the usual form, but at the foot was the clause, "Contents unknown." The court said: "It is obvious, therefore, that the acknowledgment of the master, as to the condition of the goods—cotton-thread in boxes, inclosed in larger boxes—when received aboard, extended only to the external condition of the cases, excluding any implication as to quantity or quality of the article—the condition, when received on board, or whether properly packed or not in the boxes," (citing *Abbott*, 339,) Mr. Abbott says—"If there is any dispute as to the quantity or condition of the goods, or if the contents of casks or bales are unknown, the words of the bill of lading should be varied accordingly." He proceeds to notice the French ordinance, and some of the writers on the subject. See also *Flanders on Shipping*, § 501.

It appears to me far from being clear, that the terms used in this bill of lading necessarily imply that it was unknown whether the casks contained molasses. For example, if an action was brought for the loss of these barrels of molasses, through the fault of the master, would not the production of the bill of lading be proof of the barrels having contained the article, leaving the quantity and value to be proven?

Suppose these casks had been thrown overboard, whether in a case of general average or not, would not the bill of lading be proof of molasses being in the casks, and the average quantities of what was in those delivered, be evidence of the quantity, and the average value, of the value?

The phrase, "gauge unknown," means, simply, that the capacity of the barrel was not verified; "contents unknown" may mean that the quantity of molasses in the casks was unknown, or that it was unknown whether there was molasses in them or not. The latter is, probably, the most natural meaning; yet, as it is repugnant to the general tenor of the instrument, I doubt if it must be taken as, necessarily, the true and only meaning. It may be regarded as protecting the party, in case of liability for loss, from the effect of an admission that the casks were full, deducible from the rest of the bill of lading, and, particularly, the clause in it, that the freight was to be paid at so much a gallon, gross gauge.

The result of our examination of the subject is this:—

The owner of liquids, or any articles, shipped in casks, of any description, is, in the first instance, chargeable with the duty of supplying proper ones, and would, presumptively, be responsible for a loss, arising from their insufficiency or defects.

The effect of an unqualified bill of lading is, to transfer this presumptive responsibility to the captain and owners of the vessel. They, therein, acknowledge the good condition of the casks, upon their reception on board, and engage to deliver them, and their contents, as described, in the same condition.

When the case presents nothing else, if the casks be delivered empty, or nearly so, and the actual cause of the leakage be unknown, or conjectural, the owners of the vessel lose their freight. They have not performed their engagement. A proportion of freight would also be lost, for any number of the casks delivered empty, as well as for any portion of the contents of any cask leaked out. The loss, in these cases, is legally attributable to the defect of stowage, or some cause over which the master had control, and for which he has engaged to be responsible.

As, however, a bill of lading, treated as a receipt, is not conclusive, it is open to the ship-owner, and master, to prove, explicitly, that the casks were, in fact, unsound, or badly made; and, in such

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a case, the original responsibility of the owner, for their condition, is restored, and he is bound to pay the freight.

A bill of lading may be so qualified, as to avoid any acknowledgment of the good order of the casks, or the quality or quantity of the contents. Like the French phrases referred to, it may import only, that these matters are so represented. In such a case, the burden is thrown upon the shipper, to establish the truth of his statements: for example, upon a question of loss, to make the owner of the vessel responsible; and, upon a question of freight, if the casks be delivered, it would be earned, whatever might be their condition or their contents. In either case, explicit words should be used, to do away the obligations, which the interests of commerce have rigorously imposed, upon the masters and owners of vessels engaging to carry goods for hire.

In the present instance, we find it expressly stated, that all the barrels of molasses were well and properly stowed, and none of the molasses was lost by the perils of the sea, nor by any negligence, or want of care, on the part of the owners of the vessel, or their agents: but the waste or loss arose solely by, or in consequence of leakage, fermentation, or inherent waste.

Every cause of the leakage is, therefore, necessarily excluded, except the bad condition of the casks when shipped. The effect of the acknowledgment in the bill of lading is therefore removed by proof of the fact. The primary responsibility of the shipper for the soundness of the casks is reinstated, and the obligation to pay the freight becomes complete.

As to the effect of the phrase, "Contents and gauge unknown," used in this bill of lading, they cannot be considered as implying more than ignorance of the quantity or quality, not of the fact of there being molasses in the casks. The body of the bill of lading is an admission of this fact, not controlled by the added words. Besides, the admission in the case settles this point.

Judgment for the plaintiff, for the amount of the freight of the eight barrels.

JOHN WEBSTER *v.* BRYAN K. STEVENS and JOHN A. STEVENS.

When the owners of adjoining lots, by agreement, construct a wall partly on each lot, for the common support of their buildings, the wall so constructed, if used as such for twenty years, is a party-wall, in the legal sense of the term, and the owner of each house has an easement, for its support, in that portion of the wall which stands on the adjoining lot.

So, when the owner of two adjoining lots erects a building on each, with a wall partly on each lot, for their common support, a conveyance, by him, of either lot, conveys, with the building, an easement for its support on that part of the wall which stands on the other lot.

In all cases where such an easement exists, neither owner or occupant can interfere with the wall, to the detriment of the other, without his assent.

But where such a common wall is erected by tenants for years, although it may be a party-wall, as between themselves, it creates no easement binding on the owner of the reversion in fee, that can prevent such owner, when the term expires, from dealing with his property, as if no such wall had been erected.

The legal rights of a grantee of a reversioner are exactly the same.

Judgment for defendants, with costs.

(Before HOFFMAN, SLOSSON and WOODRUFF, J.J.)

Heard, April; decided, May, 1856.

THIS was an action to recover damages for the wrongful taking down, by the defendants, and their servants, of a party-wall, which was alleged to be the common support of a building occupied by the plaintiff, under a lease, and an adjoining building, owned by the defendants.

The defendants, in their answer, claimed that they had a legal right to take down that part of the wall in question which was on their own lot; that it was this right only that they had exercised, and that, in its exercise, they had acted with all proper care and diligence, and after notice to the plaintiff of their intended proceeding.

The cause was tried before the Chief Justice, and a jury, in November, 1855.

When the evidence on both sides was closed, the Chief Justice instructed the jury that the defendants were, in law, entitled to their verdict, and directed them to find a verdict accordingly.

To this instruction, and direction, the counsel for the plaintiff excepted.

A verdict for the defendants was then entered, but liberty was given to the plaintiff to make a case, containing the proceedings and evidence on the trial, and the exceptions then taken were ordered to be heard, in the first instance, at General Term, and judgment, in the mean time, to be suspended.

The following are the material facts which, it appears from the case made, were proved upon the trial:

The plaintiff is lessee, under Daniel Stanton, of No. 40 Warren street. His lease is dated 15th February, 1850, and is for seven years from March, 1850, and consequently not yet expired.

The defendants are owners of No. 42, adjoining on the westerly side.

Both lots were originally owned by Trinity Church. No. 40 was leased by the Church, in May, 1810, to William Cutting, for forty-two years from the 25th March, 1811. The term expired on the 25th March, 1853.

No. 42 was leased by the Church, in April, 1810, to John Jubel, for forty-two years from the 25th March, 1810. The term expired on the 25th March, 1852, one year before the lease of No. 40.

In each lease was contained a covenant, by the lessee, that he would erect upon the lot demised to him a three story brick house, within three years from the date of his lease, under the penalty of a forfeiture of the lease; and the right was reserved to the lessee, and his assigns, "within ten days after the expiration of the term, but not at any time thereafter, to remove and carry off the materials and all or any buildings to be erected on the demised premises, the fences which should enclose the same only excepted."

The lessees each erected a building on his lot, in pursuance of the conditions of his lease; but the wall between the two houses was constructed, one half on each lot, so as to constitute a party-wall, in the sense of a wall for the mutual support of each house.

In 1812, Trinity Church conveyed the two lots in fee to St. George's Church, subject to the two leases aforesaid.

On the 3d June, 1850, St. George's Church conveyed, in fee, No. 40 to Julia Stanton, (the wife of Daniel Stanton, under whom plaintiff claims,) subject to the lease to Cutting, and reciting in the deed the clause of the lease which gave him the privilege of removing the buildings on the lot, within ten days after the expiration of the term.

The lease to Cutting must have been vested in Daniel Stanton before the conveyance to his wife, as his lease to the plaintiff is dated 15th February, 1850; and as his lease to the plaintiff was for a term of seven years, it was, at the time it was made, a demise of a term extending some four years beyond the term of the Cutting lease.

In February, 1852, St. George's Church conveyed, in fee, No. 42 to the defendants in this action, subject to the lease to Juhel, with a covenant that the premises were free from all charges and incumbrances, &c., "saving and excepting all claims lawfully to be made under or by virtue of said lease, and the provisions and stipulations thereof."

The defendants became the holders of this lease, in their own right, by intermediate assignments from Juhel, and thus the term was merged in the larger estate.

It will thus be seen, that the deed to the defendants of No. 42 was made a little over a year before the expiration of the Cutting lease of No. 40.

Assuming that the rights, as to the removal of the buildings, reserved by the original leases, was not affected by the subsequent conveyances, the defendants would have a right, under the Juhel lease, to have removed their building within ten days after the 25th of March, 1852, and Stanton, under the Cutting lease, as respects the defendants, within ten days after the 25th of March, 1853.

In November, 1855, some eight months after the period within which Stanton's right of removal had expired, and eighteen months after their own right of removal had expired, the defendants took down their building, and in doing so undertook to remove that portion of the common wall which stood on their lot. But finding this impracticable, after progressing to some length, without endangering the plaintiff's house, the whole wall was taken down by order of the public authorities.

On the trial the question of negligence in the manner of removing the wall was, by plaintiff's assent, withdrawn from the jury, and the case turned wholly on the question of law.

John Graham, for the plaintiff, contended that the Chief Justice had erred in directing the jury to find a verdict for the defend-

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ants, and that, upon the pleadings and evidence, the plaintiff was entitled to a verdict, and that the case ought to have been submitted to the jury to assess the damages which he had sustained. He insisted that as the buildings were not removed at the expiration of the leases, they came into the possession of the reversioners and their grantees, subject to the same rights and easements as when held by the tenants before the expiration of their leases. He cited *Eno v. Del Vecchio*, (4 Duer, 53; *United States v. Appleton*, 1 Turner, 500.)

D. Lord, for the defendants, insisted that they were clearly entitled to retain the verdict that had been given. Neither of the tenants, he argued, could, by any act or agreement, encumber the reversion of the lot demised to him, or to an adjoining tenant, by creating an easement or otherwise. The easement created by the tenants could last no longer than during the continuance of the term common to both. When that term expired there was an end of the easement as to the reversioner, who was under no obligation to continue the old wall and not to improve his property by new buildings.

BY THE COURT. SLOSSON, J.—It is undoubtedly true that where the owners of adjoining lots construct, by mutual consent, a wall, partly on the lot of each, for the common support of the buildings erected by them on their respective lots, and the same is used as a wall for common support for twenty years, such wall is strictly a party-wall, within the legal meaning of that term, and the owner of each house has an easement in the portion of the wall standing on his neighbor's land for its support.

So also where the owner of two lots erects a building on each, with a common wall for the support of the two, standing partly on each lot, a conveyance of either lot by the original lines of the lot, conveys with the building itself an easement for its support in the portion of the wall standing on the other lot; and it is equally true, that where such easement of support exists, neither owner or occupant of one freehold can interfere with the wall to the detriment of the other, without his assent. (*Eno v. Del Vecchio*, Superior Court, October term, 1854; 4 Duer, 53.)

In the one case the owners of the lot have, by common consent,

at the time of the erection of the wall, and by its subsequent uses, appropriated the same as a party-wall and have thus estopped themselves as against each other, and consequently as against the grantees of either from denying the easement; and, in the other case, the common owner of both lots having expressly appropriated the wall as a party-wall, is equally estopped, as against his own grantee of one lot, unless, indeed, by the terms of his grant, the covenant is expressly or impliedly taken away. *

So, as between the lessees of Trinity Church, in the present case, Cutting and Juhel, neither could, during the term common to both, claim a right to interfere with the easement of the other in the wall, which they had, by common consent, erected, as a party-wall, between them. The only query is, whether this right of easement continued beyond this common term.

It certainly could not, by reason of any assent of the lessees, at the time of its erection, for they had no more right to encumber the reversion than to convey it; and it is equally certain, that there is nothing in the case to warrant the presumption of a grant of such an easement, on the part of the defendants, since the expiration of the term. They remained passive, it is true, eighteen months after the expiration of their lease, but no adjudicated case would justify the holding of such a period sufficient to raise the presumption of a grant.

The period during which this wall was used as a party-wall, anterior to the expiration of the Church leases, has nothing to do with the question, as against the reversioners.

The case is not to be treated as though St. George's Church had conveyed the fee, after the expiration of these leases, and of the ten days allowed for the removal of the building. I do not intend to say that, even then, a conveyance, by that Church, of either lot, "with the appurtenances," would necessarily have conveyed the easement in question. I incline to the contrary opinion.

It is enough, to say that the conveyances were, in fact, made before the expiration of these leases, and, therefore, before the Church had ever succeeded to the possession, of the reversion of either lot. The question, therefore, of the effect of the union of the two reversions, in possession, in one owner, as affecting the rights of his grantees, does not arise. Each grantee, under the deeds of St. George's Church, took the reversionary right, as Trinity Church,

if she had never parted with her title, would have taken it, clear of every incumbrance created by the lessees.

It must be borne in mind, that there is nothing, in the terms of the original leases, which authorized, or contemplated, the erection of a party-wall; each lessee was bound to build on his own lot, but no right was given to encroach on his neighbor's lot. The scheme of a party-wall was one of their own contrivance, and for their mutual convenience only.

There is but one aspect of the case which seems plausible, and that is, that, as the lessees could not remove their buildings after ten days from the expiration of their leases, the buildings, after that period, if not removed, became a part of the freehold, and that the grants of the Church must be construed as having passed this chance, or possibility, of the non-removal of the buildings, and, with it, the easement in question, as a necessary "appurtenant," in case the buildings should not be removed. In other words, that the grants, though made anterior to the expiration of the leases, are to be construed as though made after the ten days had expired, and as having passed the title to the respective houses, as they then stood, with the mutual easement of support, as one of the appurtenances.

The answer to this is, what has been already suggested: the deeds conveyed only the reversionary right, and if that right was not itself subject to the easement, the mere conveyance of the right, "with the appurtenances," would not create the easement.

The plaintiff made a point, that the wall was not removable, by either lessee, as against the reversioners, inasmuch as it was the lateral fence of the respective lots, each half of the wall being the fence of the lot on which it stood.

The leases, certainly, in the privilege of removal, excepted the fences enclosing the lots; but to say that either wall of the building was to be left standing, as a fence, while the building itself was to be removed, would be giving, to the clause in question, a latitude of construction quite too broad to be seriously entertained. And, moreover, it is difficult to see what right the plaintiff had to complain of the defendants' breach of their covenant, in this respect. If there is no right of party-wall, the wall, in plaintiff's theory, constitutes, as respects the reversioners, two independent fences,

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and if either reversioner removes his fence, the rights of the other are in no wise affected, and neither has a remedy for it.

The defendants must have judgment, upon the verdict, with costs.

JOHN MARQUART, respondent, v. JOHN LA FARGE, appellant.

An appeal from a judgment to the General Term only brings under review the questions of law raised at the trial, and the exceptions there taken. It brings the facts and evidence under consideration, no further than is necessary to raise the questions of law.

Such an appeal will not present, for review, an order of the Special Term, denying a motion for a new trial, made on the ground that the verdict is against evidence. If the party wishes to raise that question in the General Term, he should appeal from the order denying a new trial.

When a person is in the quiet and peaceable possession of premises, with the knowledge and acquiescence of the owner, for upwards of a month, and has taken such possession under a purchase from one who claims to have a parol lease from such owner, and was in actual possession for two months, he is to be deemed rightfully in possession, so far as to entitle him to occupy till the 1st of May then next, or, at least, until the tenancy be terminated by notice. The owner may not forcibly eject him, and defend the act by showing that such alleged parol lease was not binding upon him.

Still less was the owner justified in closing the entrance, and refusing to permit such tenant to remove his goods.

In an action for damages, in such case, the owner is liable for the value of the goods detained, and for the injury done by breaking up the business of the tenant, who kept a refreshment saloon within the purlieus of a theatre.

In such case it is not erroneous to allow evidence that "the plaintiff did a pretty large business"—that "the business was good and profitable," and that "one half the receipts were clear profit," to be given to the jury, among other testimony, to aid them in fixing the amount of damages.

(Before HOFFMAN, SLOMON and WOODRUFF, J.J.)

Heard, April; decided, May, 1856.

APPEAL, by defendants, from a judgment in favor of plaintiff for \$979.48 damages and costs.

The action was brought to recover damages for the unlawful and forcible entry, by the defendant, into a refreshment saloon in the Metropolitan Theatre, then possessed and occupied by the plaintiff, and, also, for taking and converting to his own use, a num-

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ber of articles of personal property, enumerated in the complaint, then owned and possessed by the plaintiff. The damages were laid at \$5,000.

The answer averred that the defendant was the owner of the saloon, and justified his entry as such, and denied the conversion of the goods and chattels mentioned in the complaint.

The cause was tried before Bosworth, J., and a jury, in June, 1855.

It was proved, on the trial, that on the 8th or 9th of January, 1855, the defendant caused the saloon in question, which was then, and had been for more than a month, in the possession and occupation of the plaintiff, to be closed, and the doors to be fastened, so as to exclude the plaintiff and all other persons therefrom; and that the liquors, provisions, and other articles mentioned in the complaint, belonging to the plaintiff, were, at that time, in the saloon, and that the defendant had refused to permit the saloon to be opened, so as to enable the plaintiff to remove them.

It also appeared in evidence that, in the month of September or October, 1854, one Simon Steinfret had taken possession of the saloon, and had continued in the occupation thereof, in the business of selling liquors, confectionary, and refreshments generally, until the 4th of December following, when he sold out to the plaintiff, for the sum of \$1,100. Steinfret, who was examined as a witness for the plaintiff, testified that he hired the saloon of one Henry Willard, who was in possession of the Metropolitan Theatre, under a lease, it was alleged, from the defendant, who was the owner of the building; that he paid Willard, as rent, \$25 per week, until the saloon was finished, and afterwards \$100 per week, and that the plaintiff was to pay Willard the same rent until the first of May following. This witness further testified that, whilst he was in the occupation of the saloon, the defendant was frequently there, and inquired of him about his business, and asked what rent witness paid, and thought that the business would be better by and by, when everything was finished.

Another witness, on the part of the plaintiff, swore that the defendant was in the saloon when occupied by the plaintiff, and talked with the plaintiff, but that he did not hear what was said. This witness was asked, what was the extent and amount of the plaintiff's business. The counsel for the defendant objected to

the question; the objection was overruled, and the counsel excepted to the decision.

The witness answered, that the business was good and profitable, but that he could not tell the amount of the receipts.

The witness was then asked, what proportion of the receipts was profits?

To this question, also, the defendant's counsel objected; the objection was overruled, and the counsel excepted.

The witness answered that he knew that one-half of the receipts was clear profit. This witness also testified that the saloon was closed by building a brick wall in the door-way, and that the defendant would not permit the wall to be taken down, so as to enable the plaintiff to get his property, which was in the saloon.

Another witness, for the plaintiff, swore that he saw the defendant in the saloon on the 2d or 3d of January, and heard him ask plaintiff how his business was? Plaintiff replied, he was doing very well. They talked about repairing a steam pipe, and defendant said that he would attend to it; that his men had been backward.

The plaintiff then proved that, on the 4th of February, the defendant caused Willard to be dispossessed, under the statute for the non-payment of rent, and that, in the proceedings, the premises in the occupation of Willard, as tenant, were described as the Metropolitan Theatre.

Other witnesses were examined, on the part of the plaintiff, but it is not deemed necessary to state their testimony, as it had no bearing on the questions of law decided by the court.

When the plaintiff rested, the counsel for the defendant moved, upon several grounds, for a non-suit. The motion was denied, and the counsel excepted to the decision.

Evidence was then given on the part of the defendant, tending to show that he had never rented the saloon to Willard, and that Willard had no authority from him to rent it to others. He also proved, that on the 12th of February, he had given a notice in writing to the plaintiff, to remove his property from the saloon; that some of the goods were covered by a mortgage for \$480, and that those, with his consent, had been taken possession of by the mortgagee.

When the testimony was closed, the motion for a nonsuit was

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renewed. It was again denied, and the defendants' counsel excepted to the decision.

The Judge charged the jury, in substance, as follows:—That if the defendant was in possession of the premises, without right, as against the defendant, there was no doubt as to the rule of law, that he could not recover for an entry made by the defendant. After stating the rules by which the jury were to determine whether the plaintiff had a right to be in the premises and continue, the court further charged, that if the jury should find that he had a right to be there, then the defendant was liable. In estimating the damages, if you find for the plaintiff, you may take into view the breaking up of the plaintiff's business, and give him such damages therefor as you may think he has sustained. But they must bear in mind that the same was uncertain, and must have terminated by the dispossession of Willard on the 4th of February, 1855. In regard to the personal property, if you find for the plaintiff, the defendant is liable for the value of it at the time he deprived the plaintiff of it. But the amount or value taken by the mortgagee should be deducted, and the balance plaintiff is entitled to recover for, in addition to the damage from breaking up his business.

The jury rendered a verdict for plaintiff for \$806.25.

Leave was given to the defendant to make a case, upon which he moved, at the Special Term, for a new trial, upon the grounds that the verdict was against law and evidence. The motion was denied, but there was no appeal from the order denying it. The appeal was from the final judgment, and came up upon the case as a bill of exceptions.

P. G. Clark, for the defendant.

The motion for a nonsuit ought to have been granted, and we are clearly entitled to a new trial. The defendant was the owner of the saloon, and the plaintiff proved no right of possession; he was a mere intruder, and the plaintiff had a perfect right to enter and turn him out, and was not liable to any action for the exercise of his legal right. (*Hyatt v. Wood*, 4 John. 150.) Whether such was his right was a question of law which the court should have decided. The Judge erred in submitting it to the jury. The

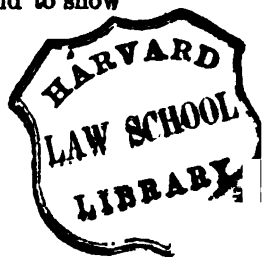
court also erred in charging the jury, that, in estimating the damages, they might take into consideration the breaking up of the plaintiff's business, and give him damages therefor, and upon a motion for a new trial upon a case, any objection may be taken, which, although not raised upon the trial, had it been raised, could not have been obviated. (1 Wend. 180; 4 Wend. 514.) As to the personal property, the plaintiff is not entitled to recover, as there is no evidence of any conversion of, or interference with, the property by the defendant, except to close the door of the saloon, which was a lawful act. The plaintiff had due notice that the saloon was to be closed, and that he must move his goods, and he declined to do so. It was, therefore, by his own neglect that he lost his goods if any were lost. As to the damages, the Judge erred in allowing the questions that were put as to the value and profits of the plaintiff's business. Finally, we insist, that the verdict was against evidence, and the damages excessive.

C. Schaffer, for the plaintiff.

The judgment, we submit, ought to be affirmed, with costs. Whether the plaintiff was lawfully in the possession of the saloon, so as to render the entry of the defendant unlawful, was a question which, upon the evidence, it belonged to the jury to determine. They have determined it in favor of the plaintiff upon competent proof, and their verdict cannot be disturbed. (1 Greenl. on Ev., p. 55, § 44; Starkie on Ev. 664.)

Then as to the personal property, the question of its conversion has also been found by the jury in favor of the plaintiff, and upon very sufficient evidence. Even if the breaking into the saloon during the absence of the plaintiff and walling up the door with brick so as to bar the access of the plaintiff, was not a conversion, the refusal of the defendant to allow the plaintiff to remove his property, undoubtedly was. The verdict is fully sustained by the evidence, and the damages, so far from being excessive, were lenient.

BY THE COURT. WOODRUFF, J.—This is an appeal from a judgment, and yet the points submitted by counsel for the appellant on the argument, relate chiefly to the evidence, and the facts which he conceives were established thereby, and tend to show that the verdict is against the weight of the evidence.



Marquart v. La Farge.

That question does not properly arise upon an appeal from a judgment on the verdict. By section 848 of the Code, an appeal upon the law only lies from a judgment entered at Special Term, unless the trial be had before the court or referees. When the trial is by a jury, their finding can only be reviewed by a motion for a new trial under section 849, and if the moving party, having made such a motion at Special Term, is not satisfied with the decision there made, he should appeal from the order denying such new trial. An appeal from the judgment does not bring such an order under review, except so far as the consideration of the questions of law raised at the trial, and the appellant's exceptions there taken may have that effect. So far as the facts are involved, the finding of the jury must, upon such an appeal be taken as conclusive and final.

The appellant in this case was, therefore, in error, in supposing that his appeal brought before the General Term the broad question whether a new trial ought to be granted.

It may, however, be satisfactory to the parties to say, that we have looked into the evidence, and are satisfied that the verdict ought not to have been set aside as against evidence, and that, in this respect, the order denying a new trial was right, and so we should feel constrained to say if an appeal from that order had been regularly before us.

The questions were whether the plaintiff was in the rightful possession of the saloon from which he was forcibly ejected or excluded by the defendant, and whether he had a right to continue in such possession; whether the defendant, on entering and excluding him from the saloon, took and detained the plaintiff's property against his will, and what damages did the plaintiff sustain by reason of such entry, exclusion, and detention.

There was evidence that Steinfret the assignor of the plaintiff, under color of a hiring from Willard, the lessee of the theatre, entered into possession of the saloon, stocked it with liquors, furniture, materials for refreshments, &c., and kept it for about two months. That defendant was there frequently during that time; inquired about the business; expressed the opinion that the occupant would do better by and by, when every thing was finished; recommended him to fit up the saloon somewhat more attractively; inquired into the amount of rent he paid; and, by his acts and

conversation, warranted the belief that he orally at least assented to Steinfret's occupation, and to his payment of rent to Willard, which Steinfret testifies he did pay. At about the end of two months Steinfret sold out to the plaintiff; he took possession and occupied, without objection, for a month or upwards; the defendant was also there, and knew of the plaintiff's occupation, and apparently acquiesced; inquired also of him how business was, and promised to have some repairs done, which the plaintiff required for uses connected with the saloon.

Doubtless there is evidence in conflict with this testimony, and tending to show that the defendant had not let the saloon to Willard with the theatre; but the jury were warranted in finding that this was such an acquiescence in the hiring by the plaintiff, or his assignor, as would entitle him to occupy till the first of May then next, or at least such as would have made the plaintiff a tenant at will or by sufferance, (1 Rev. Stat. 744, § 1 and § 7,) and, in either case, the defendant could not terminate the tenancy by a forcible expulsion of the plaintiff from the premises; still less did it justify the defendant in closing the entrance to the saloon with masonry, and refusing to suffer the plaintiff to remove his property therefrom, which there was evidence tending to show, and which we think proved, the defendant did.

This view of the subject also disposes of the exception taken to the refusal of the Judge to order a nonsuit, for although the defendant, more than a month afterwards, notified the plaintiff to remove his goods, this, if it had any proper effect upon the plaintiff's rights, which I doubt, after the defendant's previous refusal, could only affect the amount of damages and not the right of action.

The only other exception taken to the rulings of the court on the trial, relates to the admission of evidence of the extent of the plaintiff's business; the amount of business done, and what proportion of the receipts were profits.

The plaintiff was engaged in keeping a restaurant or refreshment saloon. The defendant forcibly bricked up the entrance and broke up the business. For this the plaintiff was entitled at least to a full indemnity. The good-will of that business was wholly destroyed. Now it was certainly competent to prove, in some manner, the nature and extent of the injury, and the value of the

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business was a proper subject of estimate by the jury. It may be that a calculation of possible or probable profits, in view of the ordinary uncertainties of business, would not be allowable. If the question objected to seemed to call for such a calculation, it was not so answered; all that was testified was, that the "plaintiff did a pretty large business;" that "the business was good and profitable," and that "one-half the receipts were clear profit."

This general testimony to the value of the business, though not specific enough to form a very clear guide to the value of the good-will, unless followed by other proof, was, in its nature, competent. In judging of the extent of the injury, the plaintiff had a right to place the jury, as nearly as possible, in a situation to know all the facts and circumstances attending the transaction, and the condition in which he was before the injury, and the effect of that injury, as fully as if they had been actually cognizant of these facts and circumstances as they transpired.

The judgment must be affirmed, with costs.

JOHN G. GOTTSBERGER, JR., and JOHN F. O'NEIL, administrator,
&c., of FRANCIS O'NEIL, v. GEORGE J. SMITH, JAMES B. TAYLOR,
and CHARLES B. SWORDS.

A. was appointed, by a Surrogate, administrator, *ad colligendum*, pending a contest upon a will. He employed B., as his agent, to collect the moneys of the estate. Subsequently, B. was appointed administrator, *ad colligendum*, in the place of A. At that time, B., as agent, had a sum of money in hand, collected for A. Upon passing the accounts of the latter, he was charged with such sum, and B. gave him a receipt for the same; whereupon, A. was credited such amount. B., upon being appointed, gave the usual bond, with the defendants Taylor and Swords as his sureties, conditioned, among other things, to account for all money, property, and things in action, received by him as such collector, whenever required, &c. *Held*, that the sureties were responsible for the money thus collected by B., as agent, and comprised in his receipt to the former collector, A.

Held, by Hoffman, Justice, that if the moneys had been in his hands, as a debtor to the estate, when he was appointed collector, the sureties would have been responsible, reserving to them the right to prove that the debt of the principal—the collector—was desperate, as he could have proven that the debt of a stranger was not collectable.

(Before OAKLEY, CH. J., HOFFMAN and SLOSSON, J.J.)

May, 1856.

APPEAL from a judgment, entered, upon the direction of a Judge at Special Term trying the cause without a jury, with a stay of proceedings until the decision.

The action is brought by the plaintiffs, as administrators, with the will annexed, of Francis O'Neil, deceased, to recover the sum of \$1,397.97, and interest from February 17th, 1853, alleged to be due to the estate of said O'Neil, from George J. Smith, the defendant, a former administrator, *ad colligendum*, of the estate. The action is upon the bond given by said Smith, upon his appointment as such administrator, with the other defendants as his sureties. Such bond has been duly assigned to the present plaintiffs, administrators, with the will annexed.

Pending a contest before the Surrogate of New York, as to the will of one Francis O'Neil, Thomas S. Henry, was appointed administrator, *ad colligendum*, on the 1st of May, 1847. He continued in such office until the 16th of February, 1850; during all which time George J. Smith, the defendant, was employed by him, and acted as his agent, in the collection of the rents of the leasehold property, of which the estate principally consisted.

On the 15th of February, 1850, these letters to Henry were revoked, and special letters, *ad colligendum*, issued to the defendant Smith. Thereupon, such defendant executed a bond to the people, with Swords and Taylor, the other defendants, as his sureties, in the penalty of \$10,000, conditioned as follows: "That if he, the said George J. Smith, should make a true and perfect inventory of such of the assets, of the said deceased, as should come to his possession or knowledge, and return the same, within three months, to the office of said Surrogate, and should faithfully and truly account for all property, money, and things in action, received by him as such collector, whenever required by the said Surrogate, or any other court of competent authority, and faithfully deliver the same to the persons who should be appointed the executors or administrators of the said deceased, or to such other persons as should be authorized to receive the same by the said Surrogate, then the said obligation should be void; otherwise, to be in full force and virtue."

Smith continued to act as such collector until the 11th of January, 1851, when letters of administration, with the will annexed, were issued to the present plaintiffs.

Previous to his appointment, the said Smith, as agent of Henry, had collected, from the leasehold premises, rents to the amount of \$1,086.90, which he had not paid over to the said Henry, but was his debtor to that amount. After his appointment, and upon Henry's accounting, Smith, at the request of Henry, gave him a receipt for the said sum of \$1,086.90.

On the 23d of September, 1850, Henry rendered his account to the Surrogate, upon citation, and was, thereupon, decreed to pay over to George B. Smith the assets, remaining in his hands as collector.

Upon the appointment of the plaintiffs as administrators, they cited Smith before the Surrogate, who rendered his account, in which he charged himself, as such collector, with the said sum of \$1,086.90, so collected by him as agent, and as having been received by him from Henry.

On the 17th of February, 1853, a decree was made by the Surrogate, declaring that the whole amount of assets which had come into Smith's hands was \$3,059.49, in which was included the said sum of \$1,086.90, collected by Smith as agent of Henry; that the balance in his hands was the sum of \$1,397.97, and adjudging him to pay that balance, with interest, on such 19th of February, 1853.

Of these proceedings, the sureties had notice.

An execution against Smith was returned, unsatisfied, previous to the commencement of the present action. The court, at the trial, decided, that the plaintiffs were entitled to judgment, against all the defendants, for the sum of \$1397.97, with interest, amounting, in the whole, to the sum of \$1,688.87.

To which decision, the defendants Taylor and Swords excepted; and, thereupon, judgment was rendered for the plaintiffs, for the said last-mentioned amount, with costs.

The sureties insist, that they are not responsible for the said sum of \$1,086.90.

D. D. Field, for the plaintiffs.

E. W. Stoughton, for the defendants, Taylor and Swords.

BY THE COURT. HOFFMAN, J.—The case has been presented in two aspects. *First*: That the sureties are clearly bound by the

terms of their bond, for the \$1086.90, receipted for by Smith, even if the question is an open one. *Next*: That the decree of the Surrogate, charging Smith with the amount, is conclusive upon them.

: *First*. The obligation of Smith was, to account for all money, property, or things in action received by him as collector. The sureties covenant that he shall do this. The money in question was, in contemplation of law, in Henry's hands. He was chargeable with it; and, doubtless, was charged with it upon passing his accounts. On his accounting, he discharged himself by the receipt for the amount given by Smith, as the new collector, to him. Henry was adjudged to pay such amount to Smith. The decree, then, on the assumption that Henry had the money, was a chose in action, vested in Smith, for which he was to account. When the receipt was given, the money, legally in Henry's hands, was received by Smith from him as collector. In legal intendment, it could not have been received in any other capacity.

In *Savinders, and others v. Taylor*, (9 Barn. & Cress. 95,) the defendant was surety in a bond given by one Hutchins. The latter had been appointed collector of rates by the commissioners of sewers. The bond in question recited, that he would be entitled to receive several rates and assessments; and the condition was, to account and pay over to the commissioners for the time being, all such sums of money as he had already received, or should thereafter receive by virtue of any rates, for, or on account of, the commissioners. The plaintiffs were appointed commissioners on the 8d of March, 1826, and the bond was dated the 20th of May, 1826. The collector had been also collector under an appointment by prior commissioners, and as such, had received rates, which were in his hands at the date of his present appointment. It was held, that the present commissioners were, of course, entitled to the rates collected before their appointment; the reappointed collector was responsible to them, and that a bond conditioned for the discharge of the duties of a reappointed collector, would not be applicable to the whole duties of his office, if confined to a rate made and collected under the commission in force at the time of his appointment. The language might require, indeed, a more limited construction.

: The court then examined the language of the bond, and con-

cluded, that it extended to all moneys received by Hutchins as collector, by virtue of any rate fixed by any commissioners of sewers.

It must be noticed, that counsel contended, that the words, already received, were satisfied by covering moneys received between the 3d of March, when the existing commissioners, the plaintiffs, were appointed, and the 28th of May, the date of the bond. The cases of collector's bonds, which have been referred to by the defendants' counsel, proceed upon the ground that the term of office being prescribed by law, the obligation of the surety is solely to respond for acts or neglects during that period. It is simply that he hath performed his duties faithfully, that is, from the date of the next preceding appointment to that of the bond, and will perform them faithfully, that is, from the date of the bond to the expiration of the term. (See *United States v. Eckford's Executors*, 1 How. 258.)

The case of *Kelson v. Julian*, (80 Eng. Law & Eq. Rep. 329,) is to the same effect. Where the limited period of an appointment appears in a bond, or is shown in a pleading, the responsibility of a surety is restricted to that period, unless otherwise expressly provided.

But no question of a responsibility for former acts as a former collector arises in this case. The question is, whether the acts done, or facts occurring while he was actually collector, make his sureties liable.

In the case of *The Governor v. Lee*, (4 Dev. & Bat. 457,) claims were put into the hands of a constable, during one particular official year, and remained in his hands uncollected during a subsequent year, for which he was reappointed. In an action against the sureties of the constable on his bond of the second year, it was held, that they were liable. His committing a breach of the prior bond, by neglect to collect, could not exempt his sureties from a liability for a continued neglect during the ensuing year.

Indeed, in my opinion, this case might be rested upon the simple ground, that if Smith had been appointed collector, owing money to the estate, the sureties would *prima facie* be responsible for the due application of the amount. The debt would be *assets*. All that justice would require, would be, that they should have

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the same right to prove, in their discharge, that the debt was desperate at the time of their bond, as their principal would have to prove that the debt of a third person was not collectable.

In relation to the other point, viz.: the effect of the Surrogate's decree, our decision renders it unnecessary to pass upon it.

Judgment for the plaintiffs affirmed, with costs.

NATHANIEL L. MCCREADY, and others, v. JOB WRIGHT, and another.

The custom, in the port of New York, upon the sale of grain is, that the purchaser selects a measurer, and the measurer so selected is appointed by the board of measurers to perform the duty.

Held, that where the measurement is, in fact, made by a measurer appointed by the board, the custom is substantially complied with, and it is immaterial whether the measurer is selected by the seller or purchaser.

Held, that when the quantity sold has been ascertained by such a measurement, and the purchaser has an order for the delivery of the grain, upon the storekeeper, in whose custody it is, the delivery, so far as the seller is concerned, is complete.

(Before OAKLEY, CH. J., HOFFMAN and SLOMON, J.J.)
May, 1856.

THE action was brought for the recovery, with interest, of the sum of \$859.98, which the complaint alleged was a balance due to the plaintiffs, from the defendants, upon the sale and delivery of 3132 $\frac{1}{4}$ bushels of corn.

The defendants offered to allow judgment to be taken against them for the sum of \$782.50, with interest from the 1st of November, 1853. The offer was not accepted. The answer admitted that the defendants had purchased of one of the plaintiffs, P. Neefus, a quantity of corn, alleged to be about 3,200 bushels, at the price of 84 $\frac{1}{4}$ cents per bushel, but averred that only 3,037 bushels had been delivered. It set up a payment of \$1,800, and alleged that Neefus was the only person entitled to maintain the action, and that the other persons in whose names it was brought, were improperly joined as plaintiffs.

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The cause was heard before the Chief Justice, and a jury, in October, 1855.

The cause, upon the trial, turned entirely upon the question, as to the quantity of bushels of corn, in fact, delivered.

A joint sale, by the plaintiffs to the defendants, of a quantity of corn, in the Atlantic Bond Stores, and supposed to be about 3,200 bushels, was clearly proved.

All other material facts, that were established by the evidence, were fully stated in the charge delivered to the jury.

When the testimony was closed, and the counsel for both parties had summed up, the Chief Justice charged the jury, as follows:

That the facts appeared to be substantially, that the plaintiffs owned a lot of corn, stored in Chadborne's store, at Atlantic Dock, Brooklyn; that it was sold to Wright & Losee, (defendants,) and an order for it given by McCready, Mott & Co., which was handed, by the plaintiff Neefus, to a lighterman, (the witness Conklin.) That the lighterman took the order to the board of measurers of grain. That the practice is for the president of the board to select a measurer, whom he sends to measure the grain. That the first measurer, sent by the president, measured one hundred and seventy bushels. Mr. Langdon, another measurer was then sent, and he measured the corn put on board the lighter Independence, and some put into carts. That, by order of Mr. Neefus, the measurer (Langdon,) measured the balance of the corn, and left it on the floor of the store house. That, for the purposes of the trial, he instructed the jury, that, upon such measurement by Langdon, the delivery to defendants was complete, and the property in the corn vested in them. According to the measurement of Cross, it appeared that there were three bushels more in the lighter Independence, than was sent from the store, according to Langdon's measurement. Another lighter was sent by Conklin, (the lighterman,) which took the balance of the corn. This balance was measured, when delivered at Wilson's dock, by Mr. Cross, and there appeared to be ninety-eight bushels less than the quantity measured by Mr. Langdon, and left in the store house. That the corn may have been stolen in the store, or from on board of lighter. The question is between the measurements of Langdon and Cross. If the corn left in the store house, when Langdon

finished his measuring, 654 $\frac{1}{2}$ bushels; the plaintiffs were entitled to recover the amount they claimed. The custom appears to be, for the purchaser to employ the measurer, and each party pay half his fees, and Chadborne testified, that, in delivering corn on an order like this, the balance left in the store house was transferred to the purchaser, which seems to be the custom. The inquiry for the jury was simply how much corn was left on the floor by Langdon—the measurements differ, and the jury must decide the question.

The counsel for defendants excepted to that part of the charge, whereby the Judge instructed the jury that, upon the measurement, by Langdon, of the corn left upon the floor of the store house, the delivery thereof to the defendants was complete, and the property in the corn had vested in them; and also excepted to that part of the charge, whereby the Judge stated to the jury that it appeared to be the custom that, in delivering corn on an order like that in question, the balance, measured and left in the store house, was transferred to the purchaser.

The jury thereupon found a verdict for the plaintiffs, for \$975.86, being the full amount claimed by them.

Upon a case containing the proceedings upon the trial, the defendants moved for a new trial at Special Term.

The motion was denied, and the defendants appealed from the order, and from the judgment.

The cause was now heard upon this appeal.

B. W. Bonney, for the defendants.

E. W. Stoughton, for the plaintiffs.

BY THE COURT. SLOSSON, J.—The only question of consequence is whether the order on the storekeeper for delivery of the corn, having been handed by the plaintiffs to Conklin the lighter-man, instead of defendants, and the plaintiffs having employed him to carry away the grain, instead of leaving that to be done by the defendants, relieves the defendants from the measurement made in the store by direction of the board of measurers. The custom proved is for the purchaser to employ the measurer. That custom, carried out in this instance, would have resulted in

the employment of a measurer by the board of measurers in exactly the way in which the measurer was in fact employed. The fact that the order was handed to the president of the board by Conklin, instead of by defendants themselves, is of no practical importance. Then was Conklin the plaintiffs' agent, and not the agent of defendants, to carry the grain from the Atlantic Docks to Williamsburgh.

The grain was delivered to him at the docks, and defendants paid his lighterage. We think that they adopted his acts, and recognized and ratified his agency.

The measuring off the grain, and leaving it in the store house, was a delivery to the purchaser, according to the custom. All the corn that was left on the floor was delivered on board the lighter.

The difference between the parties arises from a difference between the measurement at the store and that made on the arrival of the grain at Williamsburgh. The question which was correct was left to the jury, and they have found for the plaintiffs for the whole amount.

We think the question was properly put to the jury, and with proper instructions.

Order denying new trial affirmed, with costs.

Judgment for plaintiffs.

NEW YORK AND VIRGINIA STATE STOCK BANK v. E. T. H. GIBSON, and others.

Evidence to prove that the acceptance of a bill of exchange was obtained by a false representation of existing facts is admissible, although not accompanied by an offer to prove that the misrepresentation was known to the holder. It is sufficient to cast upon the holder the burden of proving a valuable consideration.

The stockholders of an incorporated bank, however few in number, are competent witnesses on behalf of the corporation.

The provisions of the Revised Statutes "of promissory notes and bills of exchange," embrace all bills, wherever drawn, that are to be accepted and paid within this state.

To render the drawee of a bill liable as an acceptor upon a promise in writing to

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accept, under section 8 of the Statute, the promise must be unconditional, and if conditional when made, it is not rendered binding by a subsequent performance of the condition.

Under section 10 of the Statute, no action can be maintained to recover damages for the refusal to accept a bill, except by the person to whom the drawee had promised to accept it, and who, upon the faith of such promise, had drawn or negotiated the bill.

The mere fact that the drawee has funds of the drawer creates no obligation to accept a bill which a payee or endorsee can enforce.

An acceptance procured by a false representation is not rendered valid by the fact that the acceptor was legally bound to accept a former bill of the same amount.

New trial, costs to abide event.

(Before DUNE, BOSWORTH and SLOSSON, J.J.)

Heard, March; decided, June, 1856.

THIS was an action by the plaintiffs, as endorsees, against the defendants, as acceptors of two bills of exchange for \$10,000, each drawn upon them by one Aaron A. Kagy. The bills were in all respects alike. They were dated on the 23d January, 1854, and were payable thirty days after date, to the order of Arnold Dunlevy & Co., by whom they were endorsed to the plaintiffs.

The defence, substantially, was, that the acceptances were obtained by false and fraudulent representations, made by Kagy, the drawer, to the defendants, and that the plaintiffs were not *bonâ fide* holders for a valuable consideration.

The cause was tried before Campbell, J., and a jury, in May, 1855.

The following are the material facts, undisputed and controverted, upon which the questions of law arose that were determined by the court at General Term.

Kagy, the drawer of the bills, was a large purchaser of hogs, in the State of Ohio, which, by agreement between him and the defendants, merchants in this city, he was in the habit of consigning to them for sale, on his account; and to enable him to make his purchases, the defendants, in the autumn of 1853, had furnished him with letters of credit, by which he was authorized to draw upon them to the amount of \$52,000 and upwards. In the month of December, 1853, this credit, by the drafts which Kagy had drawn, and the defendants had accepted, was more than exhausted, and being desirous to make further purchases, he applied to a Mr. Reber, one of the owners, and president of the bank, the plaintiff

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in the action, to discount for him two bills, drawn by him on the defendants, for the sum of \$10,000 each, dated Lancaster, Ohio, January 2, 1854, payable thirty days after date, to his own order, at the office of Arnold, Dunlevy & Co., N. Y., and endorsed by himself and four other persons. The application was made on the day the bills bore date, but Reber then declined to make the loan, because he was not furnished with proof that the defendants had given to Kagy an authority to draw. Four or five days thereafter, as Reber and Kagy testified, Kagy produced, and left with Reber, a letter from the defendants, addressed to Kagy, by which they agreed to accept his drafts for \$20,000, upon his remitting to them, in currency or bills of lading for hogs, the full amount for which he drew; and Kagy also swore that he received from the defendants a telegraphic dispatch to the same effect. Upon this evidence, Reber made the advance requested, by discounting the bills that were offered, which he transmitted to Arnold, Dunlevy & Co., the agents of the bank in this city, to be presented to the defendants for acceptance and payment. The defendants refused to accept the bills, upon the ground that they were not furnished with proper bills of lading, showing that the required number of hogs had been shipped, so as to enable them, from the proceeds of sales, to meet their acceptances at maturity. In consequence of this refusal, Kagy came to this city, and, on the 23d of January, obtained from the defendants, their acceptances upon the bills in suit, which he delivered to Arnold, Dunlevy & Co., to whose order they were made payable, as the agents, and for the benefit of the plaintiff. Arnold, Dunlevy & Co. retained the bills first drawn, and caused them to be regularly protested for non-payment, as well as non-acceptance, but it did not appear that any proceedings had been taken against the endorsers, whose names, there was evidence tending to show, were forged.

The controverted questions of fact were,

First. Whether the defendants had written the letter, upon the faith of the contents of which, the bills drawn at Lancaster had been discounted by Reber. To show that no such letter could have been written by them, the defendants gave in evidence other letters, sent by them to Kagy, early in January, 1854, the contents of which were alleged to be wholly inconsistent with the sup-

position that they had given him any authority to draw beyond the amount of the original credit.

Second. Whether any false representations were made by Kagy, by which the defendants were induced to accept the drafts in suit. Upon this question, the evidence, on the part of the defendants was, that Gibson, one of the defendants, had accepted the drafts in the name of the firm, upon the positive assurance of Kagy that he had, at that time, three thousand hogs, which were on their way to New York, and would arrive, and be delivered to the defendants, in the course of a few days; and evidence was given tending to show that no such hogs were ever received by the defendants, and that, not including the bills in suit, their advances to Kagy exceeded, by more than \$60,000, the proceeds of the sales of the hogs received by them.

Lastly. It was insisted, on the part of the plaintiff, that the defendants were in possession, in the month of January, of a sufficient number of hogs to meet the first drawn bills, and which Kagy had consigned to them for that purpose. On this question many witnesses were examined, and there was a serious conflict in the testimony.

Of the exceptions taken during the trial, it is necessary to mention the following :

The counsel for the defendants, the case stated, offered to introduce further evidence, tending to prove that the representations made by Kagy to the defendants, upon the faith of which they were induced to accept, and did accept, the bills upon which the action was brought, were false and fraudulent, but the counsel for the plaintiffs objected to the evidence, unless the facts were brought to plaintiffs' knowledge, and the court sustained the objection. The counsel for the defendants excepted to the decision.

It was proved that the plaintiffs' bank, which, it was admitted, was incorporated, was wholly owned by the president, Reber, and by Mr. Arnold, of the firm of Arnold, Dunlevy & Co., and both, although their competency was objected to by the counsel for the defendants, were admitted as witnesses on behalf of the corporation. This decision was also excepted to.

When the testimony on both sides was closed, the Judge delivered to the jury the following charge:—

This action is brought to recover the amount of \$20,000, being

two drafts of \$10,000 each, drawn by a man named Kagy, and accepted by the defendants, on or about the 27th day of January, 1854. It is contended, by the defendants, that these drafts were accepted by them under fraudulent representations, made by Kagy, and that there was no consideration, for such acceptances, paid by Kagy, and that no sufficient consideration was paid by plaintiffs, and that plaintiffs parted with nothing, and gave no value, so as to entitle the plaintiffs to recover, as *bond fide* holders. To understand the precise question, it is necessary to recur, first, to the precise relations of Kagy and the defendants, on the 6th of January, 1854. The letters of credit had then expired, and there was no obligation, on the part of the defendants, to accept, growing out of these letters. I need hardly observe, that, by the statutes of this state, where a man gives, in writing, an unqualified undertaking to accept, that he is bound by such agreement, and the holder of a draft, obtained in good faith, could recover, even though, afterwards, on presentation, there should be a refusal to accept.

To which last proposition, and instruction to the jury, the counsel for the defendants then and there excepted.

The letters of credit, then, being expired before the 6th of January, when the drafts of date of 2d of January were discounted, it becomes important to see what other new agreement or promise, if any, had been made by the defendants. It is claimed, by the plaintiffs, that the drafts of 2d January were discounted on the 6th of January, on the faith of a letter produced, from the defendants to Kagy, promising to accept further, on receipt of bills of lading of hogs, or on remittance of Ohio currency. Now, if such a letter, written by defendants, was produced, and shown to Reber, and the drafts of 2d of January were discounted on the faith of it, and if, after the 6th of January, hogs in value equal to the amount of the drafts were sent forward by Kagy, and which were intended and designed to comply with the terms of the letter shown them, then there would be a liability, on the part of the defendants, on the drafts of 2d of January, if the hogs came to hand and were received by defendants, even though the shipping receipts were informal in their terms.

To which last proposition, and instruction to the jury, the counsel for the defendants then and there excepted.

If, however, as contended by the defendants, the hogs forwarded

after the 6th of January were forwarded specially in fulfilment of previous contracts, then there would not be an obligation, on the part of the defendants, to accept. It is further contended, by defendants, that no such letter, as that claimed by the plaintiffs to have been shown on the 6th of January, was ever written by them; that, if such a letter was shown, it was not genuine. Of course, you will consider all the evidence bearing on this point, and determine whether or not there was a genuine letter written by defendants, and produced, and shown on the 6th of January.

To which last proposition, and instruction to the jury, the counsel for the defendants then and there excepted.

If there was no such genuine letter, then there can hardly be a pretence that the defendants were in any way bound to accept the drafts of date of 2d of January.

It is important to look at these previous transactions, because, if there was an obligation, on the part of the defendants, to accept the drafts of 2d of January, then that, of itself, would form a good and adequate consideration for the acceptance of the bills now in suit--

To which last proposition, and instruction to the jury, the counsel for the defendants excepted—

And the plaintiffs would be entitled to recover on them, even though Kagy may have made promises which he did not fulfil, or representations which were false, in order to procure their acceptance, if such promises and representations were made by Kagy without any knowledge, notice, or procurement of the plaintiffs, or the agents in this city.

To which last proposition, and instruction to the jury, the counsel for the defendants then and there excepted.

If you should be of opinion that there was no obligation, on the part of the defendants, to accept the drafts of 2d of January, then you will consider, further, as to the transactions connected with the acceptance of the bills in suit.

If there was no previous obligation to accept, and the defendants accepted the bills in suit solely upon representations of Kagy, which were false, then the plaintiffs cannot recover, unless the bills were taken by plaintiffs without notice of such fraudulent representations, and they paid value at the time, or gave up other security, or other thing of value, or lost security which they held at the time.

It is not pretended that any money was paid at the time by plaintiffs, and, as I understand, it is not claimed that the shipping receipts were of any particular value; but it is insisted that the plaintiffs lost their remedy against the endorsers on the bills of 2d of January. If the bills in suit were treated by the defendants, and the agents of the plaintiffs in New York, as extensions of the drafts of the 2d of January, the time for payment would be extended to the defendants, and the endorsers would be discharged.

To which last proposition, and instruction to the jury, the counsel for the defendants then and there excepted.

If they were not extensions, but an independent transaction, then time was not given to defendants, and plaintiffs sustained no loss, as no liability of the endorsers would be taken away.

Again, if the representations of Kagy were substantially true, then the plaintiffs can recover on the bills, independent of any previous transaction.

To which last proposition, and instruction to the jury, the counsel for the defendants then and there excepted.

Or, if defendants accepted the bills, not on the faith of Kagy's representations, but, relying on Kagy's promises to furnish the hogs, or upon the sufficiency of the guarantee, the plaintiffs are entitled to recover.

To which last proposition, and instruction to the jury, the counsel for the defendants then and there excepted.

And after the charge, so delivered to the jury, a verdict was rendered by them in favor of the plaintiffs, against the defendants, for the sum of \$21,779.73, being the amount of the two acceptances sued on, with interest.

The defendants appealed from the judgment entered on the verdict, and the cause was heard, upon a case containing the proceedings upon the trial.

W. A. Butler and *F. B. Cutting*, for defendants.

E. Pierrepont and *D. Lord*, for plaintiffs.

BY THE COURT. DUEK, J.—Many exceptions were taken on the trial, to the ruling of the Judge, upon questions of evidence, which the conclusions, at which we have arrived in relation to his charge, render it unnecessary to consider. It is not at all probable

that, upon the new trial which it will be our duty to grant, the same questions will again be raised.

There are, however, one or two exceptions which it will be expedient to notice.

We think that the rejection by the Judge of the evidence that was offered to prove that the representations made by Kagy to defendants, upon the faith of which they were induced to accept the bills in suit, were false and fraudulent, was an error. The rejection was upon the ground that it was also necessary to show, that the facts meant to be proved were known to the plaintiffs, but unless the plaintiffs were holders of the bills in suit for value, their knowledge of the facts was unimportant. Had it been admitted, or incontrovertibly proved that they were such holders, the rejection of the evidence would have been proper, but so long as their right to be protected as such holders was controverted, the evidence was clearly admissible. It was admissible for the purpose of proving the fraud of Kagy, and of throwing upon the plaintiffs the burden of proving the consideration upon which they had received the bills.

We think, also, that Reber and Arnold, notwithstanding they were the sole proprietors of the bank in whose names the action is brought, were properly admitted as witnesses. We are unable to see upon what grounds, in consistency with the decision of this court in the case of *The Washington Bank v. Palmer*, (2 Sandf. S. C. Rep. 686,) and of the Court of Appeals in that of *The Montgomery County Bank v. Marsh*, (3 Selden, 488,) they could have been excluded. When the action is brought in the name of a bank, the stockholders, however few in number, are not parties to the action, nor is it for their immediate benefit, that it is prosecuted. They have no immediate personal right to the moneys that are sought to be recovered, but in all cases, those moneys belong to the bank as a corporation, and the interest of the stockholders is future and contingent.

I pass now to the charge of the Judge.

He submitted to the determination of the jury the following questions of fact:—Whether the drafts of the 2d of January were discounted by the plaintiffs upon the faith of the letter alleged to have been written by the defendants to Kagy, by which they promised to accept his drafts upon his remittance of bills of lading

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of hogs, or of Ohio currency. Whether, in compliance with the terms of the letter, hogs, equal in value to the amount of the drafts were in fact sent forward by Kagy, and received by the defendants previous to their acceptance of the bills in suit. Whether their acceptance of the bills in suit was procured by false representations or promises made by Kagy, and whether the plaintiffs, without notice of such false representations or promises, parted with value when they received the bills in suit, or at that time gave up, or lost their remedy upon, any other security. And in instructing the jury as to the law applicable to these questions, the learned Judge, in effect, told them, that if they were satisfied that the letter in question, was, in fact, written by the defendants, and that the plaintiffs had advanced their money upon the faith of the promise that it contained, and that the terms of the letter had been substantially complied with, then the defendants were bound to accept the drafts of the 2d of January, and that this obligation was alone a full consideration for the acceptance by the defendants of the bills in suit, so as to entitle the plaintiffs to recover, even upon the supposition, that the acceptance of the defendants upon the bills had been procured by fraud, and that the plaintiffs had parted with no value or security when they received them. We have found ourselves unable, after a repeated perusal, to give any other interpretation to the charge than that which has now been stated, and we are satisfied that, if faithfully reported, it was in this sense that it must have been understood by the jury.

If the jury had been required to answer, separately, the questions of fact that were submitted to them, and had found that the acceptances of the defendants were not procured by fraud, or that the plaintiffs were *bona fide* holders, for value, their verdict, unless it could have been set aside as against evidence, would have entitled the plaintiffs to the judgment which they claim, but it is a general verdict only that was rendered by the jury, and this may have proceeded upon the sole grounds that the plaintiffs had advanced their money upon the faith of the letter, and that the terms of the letter had been complied with. Hence, if they were wrongly instructed as to the law applicable to these facts, their verdict, whether sustained by the evidence or not, must be set aside for the misdirection of the Judge. That, to this extent, the

jury were wrongly instructed, is the conclusion to which our reflections, and examination of the law, have led us.

Conceding, for the purposes of this decision, that the facts relied on, as creating the obligation were fully proved, we are of opinion that the defendants were not bound to accept the drafts of the 2d of January; and if we concede that this obligation existed, we are of opinion that it was not alone sufficient to entitle the plaintiffs to recover in the present action.

If the defendants were liable at all, by force of a promise to accept the drafts of the 2d of January, they were so, either upon the ground that the promise was equivalent to an actual acceptance, or made them answerable, in damages, for their refusal to perform it, and we can see no reason for doubting that it is by the provisions of the Revised Statutes relative to bills of exchange, that the question of their liability upon either ground, must be determined. Those provisions manifestly embrace all bills, wherever drawn, that are to be accepted and paid within this state;* and were the terms of the statute less explicit than they are, the general rule of law would lead us to the same conclusion: that the validity of a promise to accept a bill of exchange, depends upon the law of the place where the bill is to be accepted and paid. Such was the express decision of the Supreme Court of the United States, in the case of *Boyce v. Edwards*, (4 Peters, 111,) and we deem it needless to refer to any other authorities. The bills which the defendants, in that case, had promised to accept, were drawn in Georgia, but were to be accepted and paid in South Carolina, and the court held, that, as the contract was to be executed in South Carolina, the law of that state governed its construction.

The only statutory provisions which are applicable to the question, are found in the 8th and 10th sections of the title, in the Revised Statutes, "Of promissory notes and bills of exchange." (1 R. S. p. 768.) The 8th section declares that "an unconditional promise, in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance in favor of every person who, upon the faith thereof, shall have received the bill for a valuable consideration," and the 10th section, in effect, gives a right of action to "any person to whom a promise to accept a bill may have been

* Vide *Blakiston v. Dudley*, ante p. 373.

made, and who, upon the faith of such promise, shall have drawn or negotiated the bill, to recover damages of the party making such a promise, upon his refusal to accept such bill." If the defendants were bound to accept the bills of the 2d of January, they were so by force of the provisions in one or other of these sections; that is, either as actual acceptors, or upon their refusal to accept; and if the evidence shows that these provisions cannot be applied to create the obligation, it is a necessary conclusion that none existed. It is needless to inquire whether the defendants would have been liable, at common law, for the new statutory provisions, as the terms in which they are expressed, and the original notes of the revisers, plainly show, were designed to supersede the rules of the common law, and to rescue the whole subject of the acceptance of bills, foreign as well as inland, from the difficulties in which conflicting decisions had involved it. (3 Rev. Stat. 2 ed., revisers' note, p. 609.)

Looking, then, at the evidence in the case, and giving to it that construction upon which the counsel for the plaintiffs have insisted, it seems to us exceedingly clear, that the defendants were not liable to the plaintiffs upon the drafts of the 2d of January, either as actual acceptors, or for their refusal to accept them. They were not liable, as acceptors, under § 8, since their promise to Kagy, although in writing, was not, as the statute requires, unconditional, but was subject to the condition precedent of a timely remittance of bills of lading, or of Ohio currency. Nor can it be said that the nature of the promise was at all changed by the alleged fact, that the condition upon which it depended was substantially performed. To create a liability to third persons, under the statute, it is plainly necessary that the promise, upon the faith of which they advance their funds, shall be unconditional in its original form—not be freed from a condition annexed to it by a subsequent act, or event. Hence, although the performance of the condition annexed may have rendered the promise of the defendants absolute in respect to Kagy, we cannot hold that it operated to alter or enlarge the rights of the plaintiffs.

Nor can we hold that the defendants rendered themselves liable to the plaintiffs under § 10 of the statute, by their refusal to accept the bills of the 2d of January in conformity to their promise; for although, by the terms of that section, the promise to which it

refers is not required to be in writing, or unconditional, yet it is only by the person to whom the promise was made, and who, upon the faith of it, shall have drawn or negotiated a bill, that an action for the recovery of damages, upon a refusal to accept, can be maintained. Here, the promise of the defendant was made, not to the plaintiffs, but to Kagy, and it was not by the plaintiffs that the bills were either drawn or negotiated. It is true, they were endorsed by the cashier of the plaintiffs, but they were endorsed to Arnold, Dunlevy & Co., merely as agents for collection, and not for a valuable consideration; they were not negotiated, within the meaning of the law, for the title remained in the plaintiffs.

It may possibly be said, that, as the defendants were in possession of adequate funds, when the bills of the 2d of January were presented for their acceptance, this fact was alone sufficient to create an obligation to accept them, but the law is well settled, that although the refusal of the drawee to accept, who has funds in his hands which he ought to apply to the payment of the bill, may render him liable in damages to the drawer, there is no such privity between him and the holder of the bill, as can entitle the latter to maintain an action against him.

A bill of exchange, in the proper sense of the term, never operates as an assignment of the fund against which it is drawn, and when there has been no binding promise to accept, and no express agreement by which a trust has been created, it is only by a positive acceptance, in the form which the statute prescribes, that a right of action against the drawee can accrue to the holder. (*Cowperthwaite v. Sheffield*, 1 Sand. S. C. R. 486, and 3d S. C. Comst. 243; *Marine and Fire Ins. Bank v. Jauncey*, 3 Sandf. 259; *Winter v. Drury*, id. 261; S. C. 1 Selden, 525. Vide, also, *Williams v. Everitt*, 14 East. 582; *Yates v. Bell*, 3 B. & Ald. 643.)

Had it been possible for us to hold that the defendants were under an obligation to accept the bills of the 2d of January, we could not have said that this obligation was of itself sufficient to render them liable, as acceptors of the bills in suit, if their acceptances on these were in reality procured by fraud, and the plaintiffs are not entitled to protection as holders for value. Upon this state of facts, we must have held that the acceptances, upon which this action is brought, were vitiated by the fraud by which they were obtained, and that the sole remedy of the plaintiffs against the de-

fendants, is upon the drafts of the 2d of January; that is, either upon the drafts themselves, or upon the refusal of the defendants to accept them. It cannot be pretended that the supposed liability of the defendants, upon these drafts, was the consideration which, in fact, induced them to accept the bills in suit, for the evidence clearly shows that this liability they constantly denied. We cannot, therefore, understand how a liability which, if it existed, was denied, could be urged to invalidate the defence of fraud, that must otherwise have prevailed.

The charge of the learned Judge was, therefore, erroneous, and calculated to mislead the jury, even upon the supposition that he was justified in holding that the defendants were bound to accept the drafts of the 2d of January, if the facts in relation to them were such as the plaintiffs alleged. Hence, whether such was or was not the obligation of the defendants, we are satisfied that the jury were misdirected as to the law, and consequently that a new trial must be ordered.

The result of the next trial will, in our opinion, depend upon the answers to be given by the jury to the following questions:—

1st. Were the acceptances of the defendants upon the bills in suit procured by Kagy by a false representation of existing facts, or by promises which he knew that he could not fulfil?

2d. Were the bills in suit received in good faith by the agents of the plaintiffs, as a substitute for the drafts of the 2d of January, or merely as a collateral security for the ultimate payment of those drafts? and

3d. Was there any agreement for the extension of credit to the parties on these drafts, drawer or endorsers, by which they were discharged?

In stating these to be the only questions that, in our judgment, upon the next trial ought to be distinctly submitted to the jury, we are not to be understood as saying, that the evidence given on the former trial, in relation to the drafts of the 2d of January, and the circumstances under which they were drawn and presented for acceptance, ought hereafter to be wholly excluded, since it is obvious that this evidence, or portions of it, may have an important bearing upon the determination of the questions to be submitted as they are now framed, especially upon the questions of actual fraud, and of a parting with value.

New trial granted, costs to abide the event.

SAMUEL BILBROUGH v. THE METROPOLIS INSURANCE COMPANY,
of the City of New York.

Where a statement of the amount of the loss in the preliminary proofs was definite, sworn to, certified by two appraisers, but had not the certificate of a magistrate as to the fire, the insurers cannot avail themselves of the defect, for the first time, at the trial.

A proposition to another company, containing certain representations, was found, upon the evidence, to have been made part of the application to the defendants, and to have entered into the contract between these parties.

In that proposition the plaintiff answered an interrogation as follows: "During what hours is the factory worked?" "We run the cards, pickers, drawing frames and speeders day and night; the rest only twelve hours daily. We only intend running nights until we get more cards, &c., which are making. We shall not run nights over four months."

Held, that the statement of an intention to cease running upon receiving the cards, then being made, was equivalent to an agreement to cease upon that event. The subsequent clause was an absolute limitation of the time during which they should be at liberty to run at night.

The doctrine of "a promissory representation," and the case of *Murdock v. The Chenango Mutual Ins. Company*, examined.

Held, that language in a policy which imports that the assured intend to do, or not to do, an act which materially affects the risk, its extent, or nature, involves an engagement to perform or omit such act. If the assured would reserve a right to change such intention, he must employ explicit language to denote the reservation.

The terms here used established a positive engagement.

(Before HOFFMAN, SLOSSON, and WOODRUFF, J.J.)

Heard, April; decided, June, 1856.

ALL the material facts are stated in the opinion of the court.

— *Fancher*, for the plaintiff.

— *Dyett*, for the defendants.

BY THE COURT. HOFFMAN, J.—The action is upon a policy of insurance executed by the defendants in favor of the plaintiff, dated the 1st day of December, 1853, whereby they insured the plaintiff against loss by fire, to the amount of \$4,125, viz.: \$2,250

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in marble machinery, and \$1,875 in stock manufactured, unmanufactured, and in process of manufacture; all contained in the brick cotton mill occupied by the assured, situate about thirty feet east of the Ogden mill, in the town of Cohoes, Albany county, New York, as per plan and survey No. 102, on file in this office, which is hereby made part of this policy, and to be referred to in case of loss.

A fire occurred on the premises on the 11th of October, and another on the 20th of October, 1854.

All the material facts and points arising in this case may be arranged under three heads.

1st. As to the delivery and sufficiency of the preliminary proofs, in relation to the first fire, which occurred on the 11th of October, 1854.

2d. Whether a certain paper, containing answers to questions, and signed by the plaintiff, is in evidence in the cause?

3d. If it is, what is the import and effect of an answer to one of the questions contained in it, which is relied upon as a warranty or representation, and stated to have been violated so as to discharge the insurers?

1st. On the 12th of October, 1854, the plaintiff made out and signed a statement, headed loss at Mohawk mill, October 11, 1854, in which he sets out in detail the items of the loss by the fire of that day, amounting to \$1,080. On the 30th of October, 1854, he makes and signs another statement of the loss by the fire of the 20th of October to the mill buildings, machinery and cotton. At the foot of this statement is added—

Damage on the 11th inst. to machinery,	\$934 00
Do. do. do. to stock,	96 00
	<hr/>
	\$1080 00

From which is to be deducted the sum of . . . 382 10
for certain allowances.

These statements being joined together, the plaintiff made an affidavit that the annexed account was a just and true account of the loss by fire of property insured by policy No. 132, in the Metropolis Insurance Company of the City of New York. But, in this affidavit, he says that the fire which occasioned the loss originated on the 20th of October, 1854, at about half-past one at

night, in consequence of a nail getting into a picker while in motion. This affidavit was sworn to on the 3d of November, 1854. Then follows, among the proofs, another paper headed, "Statement of loss sustained by fire in the Mohawk mill, October 20th, 1854, particulars of which were heretofore specially rendered. In this we find the following:—

"Damage, per statement rendered, of the fire of October 11, \$1,030.00."

This sum was added to the loss claimed for the fire of the 20th, making, together, \$10,709.82, and from this was deducted the \$382.10, leaving the whole claim \$10,327.72. This was signed S. Bilbrough, and is endorsed: "Received Nov. 3, 1854."

The certificate given by Mr. Hubbard, a Justice of the Peace, Cohoes, in pursuance of the requisitions of the policy, states only that he has made diligent inquiries as to the cause of the fire of 20th of October.

It may be added, that the witness Dutemple, one of the appraisers of the loss, identifies the statement as signed by him, and particularly swears as to the loss by the fire of the 11th being a true certificate.

Under these circumstances, we think that there is enough to bring the case within the principle of the authority cited. The insurers were bound, upon the presentation of these proofs, to have distinctly objected to their sufficiency. They were apprised of a claim for a loss by the fire of the 11th of October. The statement was definite; it was sworn to; it was certified by the appraisers; the great defect was, that it was not in fact certified as to such fire by a magistrate. We do not consider this a fatal objection, when taken at the trial for the first time. (*Aetna Ins. Co. v. Tyler*, 10 Wendell, 401; and *O'Neil v. Buff*, 3 Comst. 128).

2d. The next point in the cause relates to the paper which contains the answers of the plaintiff to certain questions. It is insisted by the defendant that this paper was part of the application, and was adopted as part of the policy.

This paper is marked, on the back, No. 102, and the signature is proven to be the handwriting of the plaintiff. Two other papers were produced with this paper, and the three offered in evidence; the two others were read without objection, indeed admitted by the plaintiff's counsel. He objected to this paper as inadmissible.

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His objection was overruled and an exception taken. The first paper was merely a plot or diagram of the premises. The third paper is an application to the defendants for insurance, and is hereafter particularly noticed. The second paper is the one objected to; it is headed "Representation of a cotton or woollen mill, on which insurance is to be predicated. Clear and definite answers are expected to each of the following interrogatories." Then follows a series of questions, in number 46. To these questions answers are given in the document procured, and, as before stated, it is signed by the plaintiff. At the bottom is the following application:—

"The subscriber requests insurance against fire by the American Insurance Company of Providence, R. I., on the hereindescribed factory. On building and fixed machinery, \$3,000; on moveable machinery, \$2,500; on stock, raw, manufactured, and in process.

New York, Nov. 23, 1852.

S. BILBROUGH."

The third paper is an application to the defendants, and is as follows:—

"S. Bilbrough: On moveable machinery, . . . \$2,250 00
 On stock, manufactured, unmanufactured, and in
 process of manufacture, 1,875 00
 all contained in the brick cotton mills occupied by the assured,
 situate about thirty feet east of the Ogden mills, as per plan and
 survey No. 102, on file in the office of the —, which is hereby
 made a part of this policy, and to be referred to in case of loss.
 Cohoes, Albany county, New York. Similar insurance in one year
 from 1st December, 1853. Left by S. Brown, Insurance Broker,
 November 30, 1853."

A similar insurance is thus asked to that which had been proposed or effected, according to paper No. 102, at the Providence company, or some other company. Wherever that paper was, it was to be part of the contract.

Is there not sufficient evidence to show, that instead of being in another office it was, in fact, handed, with the application, to the defendants?

Taking the evidence of De Forest and Ellery together, we are of opinion that this fact is satisfactorily proven. At any rate the

jury having, in effect, passed upon it, we see no ground for interfering with the conclusion.

This paper, then, being before the company, and acted upon in making the policy, contained a representation or an engagement, upon which the risk was undertaken. The clause in question admits of two constructions as to the period at which it went into effect, whatever that effect may be.

The paper was dated the 23d of November, 1852, and the question and answer are in the following terms:—"During what hours is the factory worked?" The answer is: "We run the cards, picker, drawing-frames, and speeder, day and night, the rest only twelve hours daily. We only intend running nights until we get more cards, &c., which are making; shall not run nights over four months."

On the 30th of November, 1853, this paper, as before observed, was left by the agent with the company, and adopted as part of the policy. Assuming that it is a renewal of the statements, as if the date had been altered, we are then to examine as to its true construction.

It is the statement of a fact as to their then running certain parts of the machinery, the cards, &c., day and night; the declaration of an intention to cease running at nights, when they get more cards which were then making. Then follows the engagement:—"We shall not run at nights over four months."

I think that the statement of an intention to cease running, when they received the cards then being made, was equivalent to an agreement to cease upon that event. Had it been proven what cards were then in hand for the plaintiff, and that they were delivered before the fire, a running at nights afterwards would have avoided the policy.

If this is so, then the subsequent clause is plainly but a precise definition and limitation of this agreement. It is tantamount to saying (when the whole is read together,) this: We will cease running at nights when the new cards which are now making are ready, and the period shall not at the utmost exceed four months.

This seems to us to be the true explanation of the clause in question. The evidence is, that the mill had not been run at nights, from May, 1854, until between the 11th and 20th of October, 1854, when, in consequence of damage by the first fire,

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they had run the cards and machinery connected therewith, at night, to make up for lost time. If the case of *Murdock v. The Chenango Mutual Ins. Co.*, (2 Comstock, 210,) can be considered as decided entirely upon one ground recognized by Justices Strong and Jewett, it would be perfectly decisive.

There was the following clause in an application for a fire policy upon a grist-mill: "The building is twenty-eight by thirty-six feet, with three run of stones, two bolts, one smut-mill, and one stove-pipe passes through the window at the side of the building. There will, however, be a stove-chimney built, and the pipe will pass into it at the side." The application was thus referred to in the policy:—"Reference being had to the application of said *Murdock & Garrett* for a more particular description, and as forming a part of this policy."

Justice Strong comments upon the contradiction involved in the term, "a promissory representation," and holds that there was in the case a positive engagement, which formed part of the policy. The assurers assumed the existing risk, until a reasonable time should have elapsed to make proposed changes, and after that, the proposed diminished risk only. The promised change was, therefore, vital to the continuance of the responsibility. I think that the policy became inoperative by reason of the non-performance of the promise made by the assured, after a reasonable time to make the proposed change had elapsed."

Jewett, Ch. J., said:—"That the clause in the application relating to the stove-pipe, amounted to a warranty, but whether such warranty was broken or not, depended on the question whether a reasonable time had elapsed to perform the undertaking."

It is true, that Justice Cady, who also delivered an opinion, places his decision upon other grounds, viz.: that an action of two persons assured jointly in the policy, could not be sustained, when one of them had transferred his interest to the other before the loss; and next, that the erection of a barn on the premises was a violation of a condition in the policy, as an act done which incurred the risk. Both Justices Jewett and Strong supported these views, and a new trial was granted. The grounds on which the other Judges proceeded are not disclosed.

But at any rate, we have a precise and important point stated by two Judges, and uncontradicted and unqualified by any mem-

ber of the court; and this, when the counsel on both sides had brought the question directly before the court. Mr. Reynolds, for the respondent, made the point, that the clause in question was not a warranty, but a mere expression of an intention, amounting, at most, to a privilege reserved, citing *Alston v. The Mech. Mutual Ins. Co.*, 4 Hill, 29.

I consider that this case has gone far to dissipate the error into which the reasoning of Chancellor Walworth, in *Alston's case*, (4 Hill, 329,) and of Mr. Justice Wilde, in *Bryant v. The Ocean Ins. Co.*, (22 Pickering, 200,) undoubtedly leads, and which has been so elaborately examined and refuted by Mr. Justice Duer in his *Treatise on Insurance*, (vol. ii., p. 749.)* It seems to me manifest, that the clause in the application would have been held by those eminent Judges, as nothing but a declaration of an intent at that time to have a stone chimney built, and the pipe to pass it at the side; and, unless the insurers could accomplish the difficult task of proving that the assured had no such intention, the policy would remain in force. But the learned Judges in the Court of Appeals, extracted a positive stipulation from these words. It was a promise, that certain things which they could do, should be done, not a statement or representation that they then had the intent to do it, which they might alter. (See further, Mr. Phillip's *Observations on Insurance*, ed. 1854, 551, 553.) After all, and without involving in obscurity by criticism what appears clear, the sound principle seems to be, that language in a policy which imports that it is intended to do, or omit, an act which materially affects the risk, its extent or nature, is to be treated as involving an engagement to do or omit such act. If the assured would reserve a right to change his intention, he must employ explicit, unquestionable language to denote the reservation.

It is plain, we think, that the terms used in the present case are much stronger to establish an express promise than those employed in the case of *Murdock v. The Chenango Co.*

The view now taken, does not affect the loss arising from the

* Mr. Arnould, the author of the most recent work on Marine Insurance, adopts the views and even the language of Mr. Duer, (1 Arnould, p. 502, § 191). The conclusion at which he arrives is, "That the positive representation of future facts, material to the risks, will, if false, avoid the policy," *id.* p. 509.

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first fire, and the result is, that the plaintiff can only recover the sum of \$647.90, with interest, being the loss by the first fire, after deducting the \$382.10, which, we understand, is applicable to that loss.

Judgment accordingly.

MORITZ STETTINER, respondent v. THE GRANITE INSURANCE COMPANY, appellants.

A condition in a policy of insurance upon goods "contained in the brick building situated," &c., by which, "lighting the premises insured, by camphene or spirit-gas without written permission in the policy, shall render it void," is a condition binding upon the assured, and operated to restrain the use of camphene or spirit-gas as a means of light in and about the goods at the place designated.

A condition in those terms should not be rejected as inoperative, because "lighting the premises insured" is an inapt expression, where goods are the subject of the insurance.

Nor should they be rejected because this form of expression is more appropriate when the premises insured are a building, &c.

It is not an error to which an exception will lie, that the Judge submits the very question in issue to the jury, although the matter of defence is sworn to by one witness, and he is not contradicted. A verdict for the plaintiff may, in such case, be against evidence, but the defendants should seek relief by motion for a new trial, and not by exception and appeal from the judgment. So the defendants might have required suitable instructions regarding the force and effect of the evidence.

(Before HOFFMAN, SLOSSON and WOODRUFF, J.J.)

Heard, April; decided, June, 1856.

APPEAL by defendants from a judgment in favor of the plaintiff for \$555.19, damages and costs.

The action was on a policy of insurance against fire, on the goods of the plaintiff. The complaint averred a loss by fire, to the amount of \$600, for which sum, with interest and costs, judgment was demanded.

The defence set up in the answer was, that after the making and issuing of the policy, the plaintiff, without the permission of the defendants, lighted the premises containing the subject insured, with spirit-gas or camphene, contrary to the conditions of insu-

rance annexed to the policy, and forming a part thereof. The cause was tried before Slosson, Justice, and a jury, in March, 1855.

The jury found, specially, that the "burning-fluid which was used by the plaintiff as a means of light, was not the same article as the "spirit-gas" mentioned in the conditions of the policy, and also found a general verdict for the plaintiff for \$429.16.

The cause was heard upon a case containing the proceedings had, and exceptions taken, on the trial, and these are sufficiently stated in the opinion of the court.

Pomeroy and Jenks, for the plaintiff.

Stevens and Hoxie, for defendants.

BY THE COURT. WOODRUFF, J.—This is an action brought to recover the amount of loss sustained by fire, under a policy, executed and delivered by the defendants, upon the plaintiff's stock of cap fronts and other goods, "contained in the brick building situate No. 101 William street, city of New York."

The defence insisted upon at the trial was, that the plaintiff, without the permission of the defendants, lighted the premises containing the subject of the insurance, with spirit-gas or camphene, contrary to the conditions of insurance.

The conditions of insurance annexed to the policy, and referred to therein as forming a part thereof, (and to which the plaintiff, by accepting the policy, must be deemed to have assented,) in the eighth article, contains these words:—"The keeping of gunpowder for sale or on storage, upon or in the premises insured, or the lighting the same by camphene or spirit-gas, without written permission in the policy, shall render it void."

On the trial, the witnesses for the plaintiff testified that on the evening of the fire, and on several evenings previous thereto, the premises occupied by the plaintiff, and containing the insured goods, had been lighted with burning-fluid.

The defendants' counsel thereupon moved to dismiss the complaint, insisting that the testimony of those witnesses showed a violation of the above recited eighth condition of the policy. The motion was denied by the court, and the defendants' counsel excepted.

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The reason stated in the bill of exceptions for the denial of the motion, is the same which formed the subject of a subsequent exception to the charge to the jury, to be presently noticed, viz.: That the eighth condition annexed to the insurance, related only to an insurance upon buildings, and not to an insurance upon goods contained in buildings.

It must, however, suffice to say in regard to this motion for a nonsuit, that it did not, at this stage of the trial, appear that "burning-fluid" was one of the prohibited articles. The eighth condition specified "camphene or spirit-gas," and the court could not say, that "burning-fluid" was either the one or the other, and therefore the court could not say that it appeared affirmatively that this condition of the policy had been violated.

The motion for a nonsuit was, therefore, rightly denied, whether the reason assigned, therefor, was correct or not.

The defendants' counsel thereupon called one witness, and one only, who, on his direct examination testified that he "had dealt in and manufactured the article known as spirit-gas and burning-fluid. There is no difference between spirit-gas and burning-fluid; it is called, in the trade, spirit-gas as much as burning-fluid;" and also that he called at the premises after the fire, and found a lamp, filled with burning-fluid or spirit-gas, standing on a desk in the office, and also found a tin can containing a few drops of the same article.

But, on his cross-examination, he testified that "it is about three years since he was engaged in the manufacture of spirit-gas or burning-fluid; that he was, at that time, engaged in a drug store in Utica; that he had never dealt in or manufactured burning-fluid in the city of New York, and did not know any thing about the trade in said city, except that when he purchased for his own use he called for burning-fluid."

There was no distinct evidence showing where the contract of insurance was made. The attestation clause imports that it was signed by the president and secretary, at the office of the defendants, in Utica, and its effect is qualified by the words "not valid unless countersigned by J. W. Bouck, agent." The policy, however, bears on its face, at its very beginning, an intimation that the policy was issued in the city of New York, thus: "No. 1178. \$400. Granite Insurance Company, New York, of-

ffice No. 78 Broadway," and it is duly countersigned by J. W. Bouck, as agent.

Upon this evidence the court charged the jury, "That whether spirit-gas or burning-fluid was the same article or not made no difference as to the result of this suit, inasmuch as the eighth condition of insurance related only to insurance upon buildings, and not to insurance upon goods contained in buildings."

To this the defendants' counsel excepted, and thereupon the court instructed the jury to find specially, in answer to this question, "Was the article of burning-fluid used as a means of light by the plaintiff the same article as spirit-gas mentioned in the eighth section of the conditions of insurance annexed to the policy?"

The counsel for the defendant objected, and took an exception to the submission of this question to the jury, "on the ground that there was no evidence to discredit the witness who had testified that spirit-gas and burning-fluid were the same article, and, in the absence of any discrediting testimony, the court was bound to deem such evidence to be true."

The jury found a verdict for the plaintiff, and, to the question specially submitted to them, they returned an answer in writing, that "the fluid spoken of by the witnesses as 'burning-fluid' is not 'spirit-gas,' referred to and mentioned in the policy."

Obviously, if this special finding is true, the first exception to the charge furnishes no ground for reversing the judgment. For if burning-fluid is not spirit-gas, then the condition in the policy has not been violated, whether that condition applies to an insurance upon goods or not.

I am of opinion that the court erred in the construction given to this condition, and that it applied to the present insurance as fully as it would to an insurance upon the building itself, and that "the lighting of the premises insured, by spirit-gas," as used in that condition of a policy upon goods, meant the use of spirit-gas as a means of light in and about the goods at the place No. 101 William street, where the subject of the insurance is described in the policy to be. No part of the words of the policy ought to be rejected as insensible or inoperative, if a rational and intelligible meaning can be given to them, consistent with the general design and object of the whole instrument; and, if the condition was

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broken, then clearly, in my opinion, the plaintiff was not entitled to recover. (*Wilson v. Herkimer Ins. Co.*, 2 Selden, 53; *Mead v. The North-Western Ins. Co.*, 3 Id. 530; *Westfall v. The Hudson River Fire Ins. Co.*, 2 Kernan, 289.)

But it is wholly unnecessary to discuss this question further, because the jury have found that the condition was not violated, and, if that is so, it is quite immaterial whether the court erred in its construction or not. The error had no bearing upon the question of fact so found.

Are the defendants entitled to have the judgment reversed on exception, because the Judge submitted the question to the jury, whether spirit-gas and burning-fluid are the same?

We think not. It should be observed that this is not a motion for a new trial upon the ground that the verdict is against evidence, but it comes before us upon exception to the submission of the question to the jury at all; and, unless the exception was well taken, we cannot reverse, although we may think that the weight of evidence was in favor of the defendants, and that the defendants, had they so requested, were entitled to have instructions given to the jury in relation to the proper force and effect of testimony, and the duty of the jury in respect thereto, which, had they been suggested by the defendants' counsel, and given by the court, might have influenced the result.

The objection and exception are simply and only that the question should not have been submitted to the jury in any form.

It was a question of fact—it was material—indeed it was the one sole fact upon which the whole defence rested. The defence itself could not prevail unless a verdict was upon this very question found in its favor. In the form in which the case then stood (the motion for a nonsuit not having been renewed) there was nothing for the court to do but take a verdict from the jury, and as no instructions to the jury were asked by the defendants' counsel, they cannot complain of the want of any specific directions.

True, it was not necessary for the court to submit any question to be specially answered, but in regard to that, the court have a discretion under section 261 of the Code.

It is in effect suggested, that the objection taken by the defendants ought to be regarded as tantamount to an insisting at the time, that upon the whole evidence, the defendants were entitled

to a verdict, and as equivalent to a request that he should so charge.

It is true, that it has been held that a verdict will not be set aside because the Judge charges a jury to find for the plaintiff if the evidence clearly warrants the verdict, and is neither contradicted nor impeached. (*Dean v. Hewitt*, 5 Wend. 257; *Nicholls v. Goldsmith*, 7 Id. 160.) And it is also well settled, that it is within the power of the court to grant a nonsuit if it be moved for, when, after the evidence for the defendant has been given, the case is so clearly with him that a verdict for the plaintiff would be set aside as against evidence. (See *Rudd v. Davis*, 3 Hill, 287, and cases there cited.) But we are referred to no case, and I find none in which it is held, that where the plaintiff's case is *prima facie* established, it is matter of exception, that though the defence seems clearly proved, the Judge submits the case to the jury, when a nonsuit is not moved for. (See *New York Fire Ins. Co. v. Walden*, 12 J. R. 518.) And it may well be doubted whether, after testimony on both sides, it is ever error in law for which an exception will lie to submit to the jury the very question of fact in issue. The court may, undoubtedly, express an opinion upon the facts, and ought, when requested, to give proper instructions regarding the rules by which the jury should be governed in regard to the construction and weight of the evidence.

Besides, it does not follow that, because in this particular case, the one witness for the defendants testified that spirit-gas and burning-fluid are the same, the defendants here were entitled (if in any case), to a peremptory instruction that the jury find for the defendants. True, a witness is *prima facie* entitled to credit. But even his credibility may, and ought to be, determined by the jury, if there is room for a rational doubt of the correctness of his testimony when applied to all the facts in the case.

Here the terms spirit-gas and burning-fluid, if these are regarded as specific names, *prima facie* import different things. The general designation, burning-fluid, if it has not a specific, technical meaning, would embrace oil or turpentine, or any other combustible fluid; or, at least, a fluid of any kind used for burning. If it had acquired a technical meaning, and designated a particular article used for producing light, it was of some materiality to know whether that meaning was general, and the place where the

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terms burning-fluid and spirit-gas were used to indicate the same article, was important. The witness not only spoke of his knowledge on that subject as acquired and founded upon the use of the terms in Utica, three years before, but admitted that he had never dealt in or manufactured the articles in the city of New York, and did not know any thing about the trade in said city, except, that when he purchased for his own use, he called for burning-fluid. The witness was the agent of the defendants. The jury and the court both had an opportunity to see the witness and his manner while testifying, and we think, that it cannot be said, upon the whole of his testimony, that as matter of law, the court should have told the jury to believe his evidence on the direct examination, and find for the defendants accordingly.

And though we should feel some hesitation in refusing a new trial if the case was before us upon the broader grounds presented by a motion to set aside the verdict, we feel constrained to say, that the defendants' exception, in the particular now under consideration, was not well taken, and therefore, that the judgment must be affirmed.

Judgment affirmed, with costs.

CASES OF PRACTICE,
AND
DECISIONS IN SPECIAL PROCEEDINGS,
AT THE
GENERAL AND SPECIAL TERMS,
AND AT CHAMBERS. (a)

WILLIAMS v. RIEL and GRANGER.

An affidavit, verifying a complaint, which merely states that the complaint is true, without stating that it is true to the knowledge of the party making the affidavit, is substantially defective. A defendant, in such a case, may serve an unverified answer. If the plaintiff refuses to receive the answer, and enters up judgment, the latter will be set aside for irregularity.

When the affidavit of verification, annexed to the copy of a complaint, contains neither the name of any person who has sworn to it, nor of any officer before whom it has been sworn to, it may be treated as unverified, and an unverified answer may be served.

At CHAMBERS, Sept. 27, 1855.

THE defendant, Riel, moves to set aside a judgment, which has been entered against him, for irregularity. An unverified answer was served on plaintiff's attorney, within twenty days after service of the summons. He returned it, with a notice in writing, that he refused to receive it, because it was not verified. After twenty days from the service of the summons, the plaintiff entered up judgment, as for want of an answer.

(a) The cases of practice reported were decided with the sanction of, at least, two, and nearly all, with that of three, or more, of the Justices of the Court.

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The defendant insists, that the verification of the complaint was so defective, that he had a right to treat the complaint as an unverified pleading, and to serve an unverified answer. That is the only question that arises on this motion.

The complaint is on a note made by Granger, payable to order of Riel, and by him endorsed to the plaintiff. The allegation, as to the making of the note, its contents, its delivery to the payee, the endorsement and delivery of it by him to the plaintiff, its presentment at maturity for payment, its non-payment, and notice to the endorser, are direct and absolute. Nothing is alleged on information and belief. The verification is in these words:

"City and County of New York, ss.:—Joseph H. Williams, the plaintiff, being duly sworn, says—That he has read the foregoing complaint, and knows the contents thereof, and that the same is true.

"Sworn to before me, &c."

J. R. Flanagan, for defendant, Riel.

Geo. Stevenson, for plaintiff.

BOSWORTH, J.—The Code requires that the affidavit, verifying a pleading, shall "be to the effect, that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters, he believes it to be true."

The affidavit, in this case, does not state that the person making it has any knowledge, whether the complaint is true or not.

The Code is not satisfied with an affidavit which states that a pleading is true, and states only that. It must also state that the person making it knows every averment in it to be true, except such as the pleading itself professes to state on information and belief.

The verification being substantially defective, the next question is, what course may a party, served with such a pleading, pursue in reference to it?

The complaint is perfect, as a pleading, without being verified. The verification is important, merely with reference to subsequent

proceedings. If the complaint is verified, the answer must be, or it may be refused. If no answer is put in, a plaintiff, in some cases, may take judgment for the amount mentioned in the summons; whereas, if not verified, an assessment and proof of damages would be necessary before judgment could be entered.

It is obvious, therefore, that a defendant must answer a complaint, whether it is verified or not. If not verified, the answer need not be. If a plaintiff wishes to verify his complaint, there is no difficulty in doing it with substantial accuracy. If he chooses to leave it substantially defective, a defendant should be permitted to disregard the verification, and treat it as an unverified pleading.

The following decisions support this view:—*Quin v. Tilton*, 2 Duer, 648; *Lane v. Morse*, 5 How. Pr. 394; *Waggoner v. Brown*, 8th id. 212; *Fitz v. Bigelow*, 5th id. 237; *Hubbard v. Cutler*, 11th id. 149-152.

If this view be correct, the judgment was irregularly entered. An order will be entered, setting it aside, with \$5 costs, and declaring the service of the answer to be regular, on defendant's stipulating not to bring any action by reason of the levying of the execution issued on the judgment.

NOTE.—In October, 1856, in *Hughes, et al. v. Wood*, the defendant moved to set aside a judgment, for irregularity. The summons and complaint were served on the 16th of September, and judgment was entered October 7, for want of an answer. An unverified answer had been served, on the 6th of September, and was returned, for the reason that it was not verified. The defendant produced the copy of the complaint, that had been served with the summons. The copy of the verification, annexed to it, did not contain, in any part of it, the name of an affiant, nor the name of any officer before whom it had been sworn to.

BOSWORTH, J.—A defendant is not obliged to verify his answer unless the complaint is duly verified. Whether the latter had been sworn to, or by or before whom, the defendant could only know from the copy of the complaint served on him. That did not notify him that either of the plaintiffs, or any one in their behalf, had sworn to it. Having no such notice, he was right in treating it as unverified, and putting in an unsworn answer. The plaintiff being clearly irregular, I have no right to consider the question, whether the defendant has merits, or his motive is to delay. The plaintiff's attorney having acted in good faith, but erroneously, the judgment is set aside, with \$5 costs.

J. H. HOWARD and CHAS. BROWN v. TAYLOR.

When, *pendente lite*, in an action on contract, the plaintiffs sell and assign the subject matter of the action to a third person, he will not be substituted as plaintiff, on motion of the plaintiffs to the record, and without notice to him. The alleged purchaser is the person to move for substitution; and he should do so, on notice to the plaintiffs, as well as to the defendant. Even in such a case, it is not a matter of course, to order a substitution, without imposing any conditions.

At CHAMBERS, October 6, 1855.

ON an affidavit of C. Brown, that this action is on contract, to recover \$314, is at issue, that plaintiffs have assigned their interest in the subject matter of the action to John C. Brown, and that the affiant, C. Brown, is desirous the latter should be substituted as plaintiff in this action; the plaintiffs, on a notice from their attorney to the defendant, and to him only, move for an order making such substitution. This is opposed, on the ground that the pretended purchaser is the proper party to make the motion.

M. K. Burke, for plaintiff.

H. W. Johnson, for defendant.

BOSWORTH, J.—This motion is made under section 121 of the Code. No notice of it has been given to John C. Brown, and the motion is not made by him, nor on his behalf. He has not had a chance to be heard. He may deny that he has bought the right of action. If the motion was granted, a third person might be made plaintiff in the action, not only without his knowledge, but against his will. If he claims to have purchased the subject matter of the action, he should move to be substituted, if he wishes to be made plaintiff upon the record, and should move on notice to the plaintiffs as well as to the defendants.

But if he should move for such a substitution, and it should be apparent that the main motive for the change was, to make the present plaintiffs witnesses, the court might impose, as a condi-

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tion, that he stipulate not to call them as witnesses. (6 Howard, Pr. R. 220.)•

In the case of such a change of interests, *pendente lite*, it is discretionary with the court to allow a substitution of the purchaser as plaintiff. Where a substitution cannot prejudice any right or remedy of the defendant, it would be almost a matter of course to permit it. When such a result would be produced by the change, the court would either refuse to permit it, or would grant it only on such terms as would protect the defendant from injury.

JAMES E. COOLEY and JOHN KEESE, respondents, v. WILLIAM BEACH LAWRENCE and WILLIAM B. LAWRENCE, Jr., appellants.

In removing a cause from the state courts to the Circuit Court of the United States, the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next Circuit Court to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him; and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein.

Held, that the entry of an appearance in a state court must be interpreted by the course and practice of that court; and that what is held in such court to be a submission to its authority in the cause, whether coerced or voluntary, must be deemed an appearance. And further, when such submission has once been made, it cannot be retracted.

Held, also, that the defendants, by appearing, in this action, by counsel, and opposing a motion for an injunction, and reading affidavits in opposition to such motion, and filing the same, with the names of their attorneys in this action endorsed thereon; and by moving that all proceedings in this action be stayed, had submitted themselves to the jurisdiction of the court, and appeared in the action unconditionally.

(Before OAKLEY, CH. J., DUER, BOSWORTH, CAMPBELL and HOFFMAN, J.J.)
October term, 1855.

THIS action comes before the court on an appeal by the defendants from an order made by Mr. Justice Duer, denying a motion, to remove it into the Circuit Court of the U. S. A., and to stay all proceedings in this court.

William Beach Lawrence, one of the defendants in this action,

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had granted a lease to the plaintiffs of certain premises in the city of New York, with covenants of renewal. He made the usual affidavit of the tenants' holding over after the expiration of the term, and obtained from a justice a summons to show cause why possession of the premises should not be delivered to him, under the statute of this state.

While the proceedings before the justice were pending, the plaintiffs herein commenced their action, and in their complaint set forth the covenants of renewal in the lease, and averred a fulfilment of all the covenants binding upon them, and stated a demand for a renewal of the lease according to its provisions. They asked judgment for a specific performance of such covenants of renewal, and an injunction to restrain the defendants from further prosecuting their proceedings for obtaining possession in the justice's court.

An order to show cause why an injunction should not issue, was granted by one of the justices of this court, with a temporary injunction to restrain the proceedings until such application could be heard. This order, with the summons and complaint, were personally served upon both defendants. They appeared upon the return-day, the 10th of May, 1855, by their counsel, to oppose the same; and presented and filed with this court an affidavit, entitled in the action, endorsed with the names of "Platt, Gerard, and Buckley, defendants' attorneys." On this, and the arguments of counsel, the motion was resisted.

On the 16th of May, an order of this court was made, which recited the making of the order to show cause, and its contents, and concluded as follows:—"And the said parties having duly appeared, pursuant to the said order, to show cause—and the defendants' counsel having read the affidavits of the defendants, and the plaintiffs' counsel having read affidavits on their part, and on hearing Mr. Cutler for the continuance of the injunction order, and Mr. Gerard in opposition thereto—it is ordered that the said injunction order be continued until the final determination of this action, and that the plaintiffs file an undertaking in the sum of five thousand dollars, to be executed by the plaintiff, Cooley, in addition to the undertaking in the sum of five thousand dollars heretofore made and filed by him in this action, and that the said bond be executed with sureties in the usual manner."

On the 24th of May, 1855, the defendants filed their petition (with the requisite bond) for the removal of this action into the Circuit Court of the United States, and to stay all further proceedings on this action. On the 25th of May an order to show cause why such removal and stay should not be granted, was made; and on the 6th of June, 1855, an order was made, as follows:—

“The defendants’ motion to remove this action into the Circuit Court of the United States, coming on to be heard, and having been argued by Mr. Platt for the motion, and Mr. Cutler in opposition thereto; and it appearing to the court that the defendants appeared by their counsel and opposed a motion for an injunction, and read and filed papers in opposition to such motion; and the court being of opinion that by so doing the defendants submitted themselves to the jurisdiction of this court, and virtually appeared in this action, and that such appearance was made on the 14th day of May last, and before the said petition for removal was filed, and that it is, therefore, too late to make such application for removal;

“It is ordered, that the said motion to remove the said action to the Circuit Court of the United States, and to stay all proceedings in this court, be, and the same is hereby denied, without costs.”

From the latter order the defendants appealed to the General Term.

Peter Y. Cutler, for plaintiffs and respondents.

James N. Platt, for defendants and appellants.

BY THE COURT. HOFFMAN, J.—The Act of Congress may be thus analyzed: It is to be made to appear, to the satisfaction of the state court, that a suit is commenced in it by a citizen of the state in which the suit is brought, against a citizen of another state; next, that the matter in dispute exceeds the aforesaid sum, or value, of five hundred dollars, exclusive of costs.

Again: the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next Circuit Court to be held in the district

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where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of the said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein. These pre-requisites being complied with, it shall then be the duty of the state court to accept the surety, and proceed no further in the cause; and any bail that may have been originally taken shall be discharged.

The preceding section of the same Act (Act 1789, Ingersoll's Abridg. § 9, p. 87) declares that the Circuit Courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and (among other cases) when the suit is between a citizen of the state where the suit is brought, and a citizen of another state.

No one contests that the jurisdiction of the state courts, and that of the United States courts, is concurrent. It is an admitted rule, that in cases of concurrent authority, the tribunal which first obtains jurisdiction, and is competent to administer it, will retain it, and another will not interfere. It is equally certain that the Act of Congress confers a privilege innovating upon this rule, and prescribing how and when this privilege may be exercised. It seems to me a manifest deduction that the statute must be, in its fair construction, pursued, or the acknowledged jurisdiction of the first tribunal must be sustained.

In accordance with such a view, the courts of the United States have remanded causes, where the application was too late, or the state court had improperly allowed the removal. (*Gibson v. Johnson*, 1 Peters, C. C. 44; *Wright v. Wells*, id. 220; *Administrators of Belknap v. The Northern R. R. Co.*, 25 Ver. 715; *Ladd v. Tudor*, 3 Wood. & Minot, 326; *Ward v. Airedando*, 1 Paine's C. C. R. 410.)

The right of determining whether the state court will continue to exercise an admitted jurisdiction in a cause, must exist to some extent in that court in the same manner as it exists in the Circuit Court of the United States, to decide whether it possesses it. In each case the court is governed by the statute, and in each tribunal that statute must be interpreted and applied to the particular

case. The state court must be satisfied as to the sufficiency of the surety. It must be satisfied that the sum or value in dispute exceeds \$500, a question regulated by the amount claimed in the action. (16 Peters, 104.) And it is to judge whether the petition has been filed, at the time of entering the appearance in that court. Thus far a discretion, indeed a duty, is incumbent upon the state court.

The question, then, comes to this: What is the meaning of the phrase, entering his appearance in the state court, which the statute employs?

By a rule of the Supreme Court of this state, which has long been in force, service of an appearance or retainer by an attorney, shall, in all cases, be deemed an appearance, except where special bail is required. And the plaintiff, on filing such notice at any time thereafter, may have the appearance of the defendant entered *nunc pro tunc*. (Rule 26 of Supreme Court; Rule 25 *id.*, 1847; Rule 7, 1854.)

The notice of retainer was, in *Francis v. Sitts*, (2 Hill, 362,) held to have the same effect as if the defendant had actually entered an appearance with the clerk. In *McKenzie v. Van Zandt*, (1 Wend. 1,) a notice of a motion to be made by an attorney, as attorney for the defendant, was held equivalent to a notice of retainer, and that to an appearance. (See, also, *Quick v. Merrill*, 3 Caines, 133.)

By the 139th section of the Code, from the time of a service of a summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

The summons prescribed by the Code, and used in this case, no complaint accompanying it, does not require a defendant to appear, but only to answer. (§ 128.) By the 130th section, the defendant may compel service of the complaint, by causing notice of appearance to be given, where the complaint is not served with the summons. When it is beyond all doubt, an answer, with notice of retainer by an attorney, would be a sufficient appearance.

Under the 139th section, this court has held, that where a de-
D.—V.

fendant served an answer, it was such a voluntary appearance as precluded him from saying that jurisdiction did not appear on the record, on the ground that it did not appear that one of the parties, jointly liable on contract, had been served with process, or resided within the city. The objection was personal, and cured by such appearance. (*Mahany v. Penman*, 4 Duer, 608.) So in *Higgings v. Rockwell*, (2 Duer, 650,) Justice Bosworth says, the voluntary appearance of a party subjects him to the same liabilities as if the summons had been personally served upon him; and he acquires all the rights of a party personally served.

What, then, is the entry of an appearance in a state court must be interpreted by the course and practice of that court; and, I think, that what is held in such court to be a submission to its authority in the cause, whether coerced or voluntary, must be deemed an appearance: and further, when such submission has once been made, it cannot be retracted.

With this exposition several decisions in our state will be found to agree, where the motion has been either granted or denied. In support of this proposition, the opinion cited and commented upon: (*Jackson v. Cantine*, 4 J. R. 493; *Redmond v. Russell*, 12 J. R. 153; *Livingston v. Gibbons*, 4 J. Ch. R. 94; *Attorney-General v. Pearson*, 7 Simons, 302; *Norton v. Hayes*, 4 Denio, 245; *Field v. Blair*, Code Rep. N. S. 292 and 361.)

The views taken by Justice Spencer and Chancellor Kent, in the cases cited, are consistent with decisions or opinions expressed in the Supreme Court of the United States. Thus, Mr. Justice Caton, in the case of *Randall v. The Delaware and Raritan Company*, (14 Howard, 80,) where he speaks of the injustice of citizens of another state being forced into the state courts, as tending to deprive them of the benefits of the constitution, speaks of it as being done without the power of election. And Mr. Justice Grier, in *Marshall v. The Baltimore and Ohio Railroad Company*, (16 Howard, 329,) while he condemns the interpretation of the act as if it were a penal statute, to be construed by its very letter, without regard to its meaning and spirit, yet speaks of it as conferring a privilege, and that the right of choosing an impartial tribunal is a privilege of no small practical importance.

All these authorities show that the question is, whether the appearance of the defendant has been an act importing that he sub-

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mits the determination of a material question of his case to the judgment of the court. It appears to us that few acts can be more conclusive than an appearance by counsel in open court, upon the argument of a motion for injunction, the reading of affidavits to oppose it, the endorsement of such affidavits with the names of attorneys, and a motion by defendants to stay all proceedings, and the recital of all this in an order of the court. And, especially, when this appearance and this resistance is to decide the chief, if not the only point of controversy in the cause.

The order appealed from must be affirmed, with costs.

The opinion is reported at length in 12 How. Pr. R. 176.

F. & N. REYNOLDS v. DAVIS & BROOKS.

Actions commenced and at issue before the Code took effect may be noticed for trial by the defendant, as well as by the plaintiff.

At CHAMBERS, October 20, 1855.

THIS action was put at issue some years before the Code took effect. It having been tried, and a new trial ordered, the defendants noticed it for trial for the present October term of this court, and placed it on the calendar. When it was reached and called, in its place on the calendar, the plaintiffs objected that the defendants had no right to notice it, it having been put at issue before the Code. They insisted that the only remedy of the defendants, in case the plaintiffs have neglected to bring the action to trial according to the course and practice of the court, is to move for judgment, as in cases of nonsuit, or for an order dismissing the complaint. The action was reserved generally, in order that the question might be formally presented at Chambers. The defendants now move, that the cause may be set down to be tried on some day to be designated by the court.

This is resisted by the plaintiffs, on the ground that the defendants have no right to notice it.

Livingston K. Miller, for the defendants.

J. Larocque, for the plaintiffs.

BOSWORTH, J.—The determination of the question presented depends upon the construction that is to be given to section 459 of the Code. So much of it as needs to be considered is in these words:—

“§ 459. The provisions of this act apply to future proceedings in actions or suits heretofore commenced, and now pending, as follows:

“1. If there have been no pleading therein, to the pleadings and all subsequent proceedings.

“2. When there is an issue of law or of fact, or any other question of fact to be tried, to the trial and all subsequent proceedings.”

It is conceded, that if the action had been commenced before the Code, but no pleading had been had until after the Code took effect, section 459 of the Code (as it now reads) would give to the defendants a right to notice the action for trial. That any defendant may do, in any action commenced since the Code took effect. (Section 255.)

If it was the intent to allow a defendant to notice for trial all actions commenced before the Code, provided there had been no pleading in them before the Code took effect, it is difficult to understand why that privilege should be denied, merely because the action had been put at issue, unless the language of section 459 is so clear as to admit of no doubt.

I think the fair meaning of the section is this: If there had been no pleading in the action, not only were the pleadings to be in the form prescribed by the Code, but the practice throughout the action, in every stage of it to its termination, was to be such as the Code has enacted.

If pleading had commenced, that was to be completed according to the rules of the system under which it was commenced. When the cause should be put at issue, the next thing in the order of proceeding would be its trial.

If at issue when the Code took effect, it intended that all subsequent proceedings in the action, should be such as the Code has prescribed. The phrase, that the provisions of the act should apply “to the trial and all subsequent proceedings,” includes as

well the giving notice of trial, and the time of serving it, and the filing a note of issue, as the actual trial after a jury has been called and sworn.

The title of the Code, which contains all the provisions regulating the mode of trial, whether by the court, before a jury, or by referees, and all subsequent proceedings to and including the entry of judgment, is entitled, "Of the trial and judgment in civil actions." (Code, title viii.)

The second chapter of this title, which is entitled "Issues and the Mode of Trial," provides that the action may be noticed by either party. (Section 206.)

It is obvious that the words, "the trial," if used in section 459 in the sense in which they are employed in other parts of the Code, include as well the proceedings necessary to be taken to give the right to try, and as any proceeding that may be taken on the actual trial.

The defendants had a right to notice the action, and, unless the counsel agree upon a day for the trial, the court will designate one in the order to be entered.

M'QUADE v. THE NEW YORK AND ERIE RAILROAD COMPANY.

When an action has been twice tried, the jury disagreeing on the first trial, and finding for the plaintiff on the second, and a new trial is granted to defendant on condition that he "pays the costs of the second trial,"—all he is bound to pay is the costs of the term at which the second trial was had. He is not bound to pay the fees of plaintiff's witnesses for attending at a term, or circuit, intermediate to those at which the two trials were had.

Nor should he be required to pay the amount of any per centage that may have been allowed to the plaintiff, on the coming in of the verdict. That is to be granted to the party who recovers final judgment: not to both parties, as might happen if treated solely as a compensation for the labor and expenses of a trial. It is not to be allowed but once. When granted, it is allowed to the prevailing party by way of indemnity for his expenses in the action; and as well for expenses in one stage of the action as in any other, down to the entry of judgment.

(Before OAKLEY, CH. J., CAMPBELL, BOSWORTH, HOFFMAN and SLOSSON, J.J.)
General Term, October, 1855.

THIS action was first tried in February, 1854, and the jury disagreed. It was noticed, and on the calendar for the following

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March and April terms. It was on the day calendar, and called in its order on the 27th of April, and the plaintiff not appearing, the complaint was dismissed. On the 17th of May, an order was made vacating that dismissing the complaint, and directing the cause to be restored to the calendar and tried on the first Tuesday of June, 1854, or as soon thereafter as the same was reached; and also directing that the fees of the witnesses on the part of the defendants attending on the April trial term, and ten dollars costs of the motion, should be deducted from any recovery which might be had by the plaintiff.

The cause was placed on the calendar and tried in the June term, 1854—the trial commencing on the 13th and ending on the 17th of June—a verdict was rendered for the plaintiff. On the 17th of June, 1854, an allowance of \$175 was made in favor of the plaintiff.

At the January Special Term, 1855, the defendant moved for a new trial, which was denied, but without costs.

On the 8th of January, 1855, the plaintiff's costs of the action were adjusted. At the foot of the adjusted bill is this statement, viz:—

Costs adjusted at	\$568.50
Allowances	175.00
Costs of motions—(October 10, 1854, \$10; October 13, 1854, \$10)	20.00
Interest on judgment, \$3,000	122.50
	<hr/>
	\$886.00

On the 24th of January, 1855, judgment was perfected and a roll filed.

The defendant appealed to the General Term, and in June, 1855, a new trial was granted, on condition that defendant "paid the costs of the second trial,"—the costs of the appeal being left to abide the event.

In the bill of costs, as adjusted on the 8th of January, 1854, there was allowed to the plaintiff, viz:—

For attendance of witnesses at the March term, 1854 .	\$89.24
do do April term, 1854 .	91.24

For jurors' fees, clerk's fees, and fees for attendance of
witnesses at June term, and a trial fee . . . \$164.08

One hundred and sixty-four dollars, eight cents, have been paid and accepted in full of the costs of the June term.

The questions now presented are, first, whether the defendant is bound to pay more than the \$164.08, in order to comply with the terms of the condition on which a new trial was granted.

At the time they were paid, the counsel of the parties differed upon the question of the construction of the order as entered.

They were paid under a stipulation that plaintiff might move the court for an order directing the costs of the March and April terms, and the allowance of \$175 to be paid. Plaintiff now moves for an order that they be paid in fifteen days, or, in default thereof, that the order granting a new trial be vacated.

L. E. Bulkley, for plaintiff.

D. B. Eaton, for defendants.

BY THE COURT. BOSWORTH, J.—A new calendar was made for the term, commencing on the first Monday of April, 1854. That, by an order of the court, was continued through the months of May and June, and causes noticed for the May and June terms were placed at the foot of the calendar, as it stood at the beginning of those months respectively.

When a cause is tried, after having been noticed for circuits prior to that at which a verdict is obtained, and a new trial afterwards is granted on payment of costs, or of the costs of the trial; the only costs to be paid are those of the circuit or term at which the trial occurred.

When successive circuits or terms commence, as often occurs in this court, on the Monday succeeding the Saturday on which the next preceding one ended, if a cause should be on the day calendar at the close of one term, but not be actually reached until the next, it might be very proper to require a defendant to pay the costs of the necessary attendance of witnesses, for both of such terms. So, if there was such prospect of the cause being reached in the last week of a term, that common prudence would

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require witnesses, living out of the city, to be subpoenaed to attend, within that week, it might be proper to include, in the costs to be paid, the fees of the attendance of such witnesses, although the cause might not, in fact, be called and tried until the subsequent term.

But such a rule should not be applied to terms which are not for any purpose to be regarded as one term. There was one calendar for the January, February, and March terms. A new calendar was made up for April, which, by order of the court, continued the calendar of that, and of the May and June terms. There is no more connection in intendment of law between the March and April terms, nor under any orders or practice of the court, than between the January and June terms.

We think the costs of the March term cannot be allowed to the plaintiff, under the decision of the court, nor according to the usual practice in respect to the costs to be paid on granting new trials.

The costs of the April term should not be allowed. The plaintiff was not only in default in not trying the cause at that term, which of itself is an answer to his claim to such costs, but he has been ordered, by an order still in force, to pay the fees for the attendance of the defendants' witnesses for the same term.

The court at General Term did not intend to, and could not properly have altered the rights and liabilities of the parties with respect to such costs, so far as they are affected or fixed by the order of the 17th of May, 1854.

The only other matter to be considered, relates to the allowance of \$175.

We understand that a per centage, when allowed on the ground that the case is difficult or extraordinary, is not merely to compensate for an actual trial, but for the skill and labor employed, and expenses incurred, from the commencement of the action to the recovery of judgment.

In some cases, full as much professional labor and skill are requisite in the proceedings prior to the notice of trial, as upon the trial itself.

The allowance of a per centage depends upon a judgment being recovered, and is to be granted to the party who recovers the judgment. (Code, § 309.)

The judgment contemplated by § 309, is a final judgment in

the action. It is the judgment or recovery, by which the right of the one party to recover, and the liability of the other to pay, the costs of the action, are determined.

It is the common practice for the Judge at the circuit, on the rendition of the verdict, to make an order for an allowance; but we do not think such an order can be deemed effectual, if the verdict is afterwards set aside, and a new trial granted.

In *Hicks v. Waterman*, (7 How. Pr. R. 370,) the plaintiff obtained a report of referees in his favor, and an allowance of a per centage.

The report was afterwards set aside, and a new trial granted on defendant's "paying to the plaintiff the costs of the reference heretofore had." Mr. Justice Barculo decided that the terms of the order did not entitle the plaintiff to the per centage, and that, on a proper construction of the Code, the defendant could not be required to pay it.

These extra allowances, like those whose amounts are specified in § 307, when made, are, in the language of § 303, granted to the prevailing party, "by way of indemnity for his expenses in the action."

In this view of the provisions of the title relating to costs, this court has often refused to allow a per centage when the cause had been over four or five times on the calendar, when one would have been granted if it had been tried at an earlier day after issue joined. Such a practice would be unreasonable, if the extra allowance is made solely or mainly to compensate for the expenses of a trial.

In several classes of cases, enumerated in § 308, an extra allowance may be made, though no trial is had. In the latter cases it is made by way of indemnity for expenses which are neither created nor increased by a trial. In cases in which a trial has been had, it is granted by way of indemnity against the expenses of the proceedings in every stage of the action down to the entry of judgment.

We are of the opinion that the plaintiff is not entitled, under the decision granting a new trial, to the \$175.00. That when a new trial is granted for causes which, according to the settled practice of the courts, require the condition to be imposed, that the costs of the trial be paid; any extra allowance which may

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have been granted should not be deemed a part of the costs to be paid, nor payment of them be required.

If these views are correct, the defendants have paid all that they were required to pay, to comply with the conditions on which a new trial was granted.

The motion must be denied.

GEORGE J. L. THOMPSON v. ABRAHAM VAN VECHTEN, and
others.

The steamboat *Alida* had been mortgaged, by successive mortgages, to four different parties, defendants in this case. Executions, upon judgments obtained in courts of this state, had been levied upon her; and, also, attachments issued from tribunals of the state. She was subject, also, to several admiralty liens, on which libels had been filed; and the marshal of the United States had seized her, and was advertising her for sale. The same had been done by some of the mortgagees, and by the sheriff. The marshal had taken possession under process from the District Court, before the present suit was commenced.

Upon an application for a receiver,

Held, that this court, in an action by a subsequent mortgagee of the *Alida*, could make no order which would interfere with the rights of the libellants in admiralty, who had first sued.

That this court would not attempt to interfere, through a receiver or otherwise, with the possession of the marshal, taken under admiralty process.

That this court would not interfere to prevent any of the parties enforcing their claims in the District Court of the United States, much less to interpose any obstructions to any exercise of jurisdiction by that court.

Held, also, in consideration of the rules appearing to prevail in admiralty, that it was lawful and promotive of justice, to appoint a receiver of the rights and interests of all the parties who had not filed libels, in order that such rights and interests might be represented by one person in such court, to whom any surplus or remnants might be paid, if such court should see fit, and to be disposed of in the present suit in this court.

At Special Term, October, 1855.

THIS action comes before the court on a motion, by the plaintiff, for the appointment of a receiver of the steamboat *Alida*, her tackle, &c.

The motion was made upon the complaint and affidavits. The following appear to be the material facts:

1. The steamboat Alida was mortgaged by the then owners to Daniel Drew, on the 30th of October, 1852. This mortgage is held, under various assignments, by the defendant, Abraham Van Vechten, and he has advertised the vessel for sale.

2. Nicholas Elmendorf having become the owner, mortgaged the vessel to one Prosper M. Shaw, and the defendant, on the 25th of February, 1854.

3. The vessel was sold, under execution against Elmendorf, to John Van Vechten, in July, 1854; and he mortgaged her to the plaintiff, by an instrument dated the 21st of March, 1855.

4. He also mortgaged her again to the defendant, Elmore, in September, 1855.

5. Judgments were recovered against Nicholas Elmendorf and John Van Vechten, in April, 1855, and levies on the vessel were made, under them, in the same month, in favor of The Westchester County Bank. These claims are now held by the defendant, Schoonmaker, under an assignment.

6. Schoonmaker claims also a lien by virtue of judgment, execution, and levy in his own name, obtained against Nicholas Elmendorf.

7. The Sheriff of Ulster county claims under a judgment against John Van Vechten, followed by an execution and levy, as he avers.

8. The defendant Parrott obtained a warrant of attachment from the Supreme Court, under the state lien law, on the 26th of September, 1855. The Sheriff of New York has attached the vessel under the same.

9. Some libels have been filed by material men in the District Court of the United States, on the admiralty side. The defendant Burbeck, and the defendant Elmore, have filed such libels among others. Some were filed before the commencement of this action. The marshal took possession, under process, in some of them, about the 22d of September, 1855, before the present suit, which was commenced on the 28th of September, 1855.

It is not necessary to state the various grounds upon which the different parties seek to support their respective claims, or to defeat those which conflict with their own.

Mr. R. H. Sherwood, for the plaintiff.

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<i>Mr. J. E. Burrell, Jr.,</i>	for defendant	Shaw.
<i>Mr. McMahon,</i>	" "	Elmore.
<i>Mr. Van Vleeck,</i>	" "	Van Vechten.
<i>Mr. Fullerton,</i>	" "	Schoonmaker, and the Sheriff of Ulster.
<i>Mr. Marbury,</i>	" "	Burbeck.
<i>Mr. Wright,</i>	" "	Parrott,
<i>Mr. Vanderpoel,</i>	for the Sheriff of New York.	

HOFFMAN, J.—I am satisfied that, as to the parties who resorted to admiralty before the present suit, I have no right to interfere. I could not aid a receiver, by a writ of assistance, to take the vessel out of the custody of the marshal; and the appointment of a receiver would be so far nugatory. Such parties could not be enjoined from proceeding in the District Court. (2 Paige, 404; 7 Cranch, 278; 4 id. 179.)

In relation to the claim of Parrott, there is the embarrassment, that he has a legal claim enforced by attachment in the Supreme Court before this suit was commenced. I think that his rights must first be settled in the District Court, or the Supreme Court. If he submit his claim as holding a lien by the local law to the former, it can be there adjudged. His possession, through the sheriff, appears to have been subsequent to that of the marshal's. Upon a condemnation and sale he could intervene. (*The Ship Robert Fulton*, 1 Paine's Rep. 620; *The Angelique*, hereafter cited.) But by the 42d section of the statute, (2 R. S. 500,) he could not proceed in the state court while the vessel was under seizure upon process from the District Court. If his lien has been duly preserved under the act of 1855, it is plain that it must be protected in this, or any other state court, according to its legal effect. Although the Supreme Court would, I suppose, discharge his attachment his lien would be protected through a receiver here.

I proceed with the case upon the assumption that the District Court has a jurisdiction which it will exercise, and has possession of the steamboat.

But weighty reasons present themselves for granting a receiver, with modified authority, if it can be lawfully done, and will be effectual for the abridgment of litigation, and the attainment of

justice. Here are four mortgagees, and several judgment and execution creditors, besides the libellants and attaching creditors, all contesting some claims, and scarcely one admitting fully any claim prior to his own. Will a receiver, appointed by this court, contribute to the proper settlement of this mass of litigation? Can the court, on this complaint and these affidavits, appoint one?

As to the first question, I think it essential to understand to what extent the Court of Admiralty will examine and determine these numerous and complicated claims, and upon what principle?

In the case of the *Neptune*, (3 Knapp, 94,) the Privy Council decided, that a material man had no lien on a vessel for materials furnished in England, nor subsequently upon the proceeds of a sale upon condemnation.

A mortgagee had taken possession before the process had issued out of the Court of Admiralty. The court below decreed in favor of material men. The Privy Council overruled the decision, and held that the mortgagee was entitled. "The court held the balance of the proceeds, *in usum jus habentium*."

But as I understand the law in our country, where a state law gives a material man a lien, the Admiralty Court enforces it, although, according to its own process, (4 Wheaton, 488; 7 Peters, 324; 1 Story, 72; *Davis v. New Brig*, Gilpin's Rep. 414; *id.* 587; and cases cited Rule 12 in admiralty.) I gather from the authorities, that a distribution of remnants in a Court of Admiralty will only be made among such as have a lien upon the vessel, suable in Admiralty, or have a lien precedently and legally fixed. Hence all attaching creditors, to whom a lien is given by a state law (as it is in our state) may apply for a distribution; and this rule is recognized in the case of the *Robert Fulton*, (1 Paine, 620.) In numerous instances, also, mortgagees, at least if they have taken possession, have been allowed to intervene, and have their rights adjusted in the Admiralty Court, for the proceeds of a sale in whole, or for remnants. The case of the *Neptune* seems express as to this, and that of the *New Brig*, (Gilpin, 552,) is equally decisive. See also the *Kosciusko*, (11 Legal Observer, 88.)

As to remnants, the court will not permit the owner to take them, against a mortgagee, whose mortgage is invalid against creditors and purchasers for want of formality; but will settle

the claims of such a creditor and such a mortgagee upon equitable principles. (*In rem*, American Banner, October, 1855.)

But it is important to understand the decision of the learned and experienced Judge of this district, upon this subject. In the case of the *Angelique*, the matter was closely investigated.

As to material men, the learned Judge held, that as a lien was given them by local law, they could proceed in admiralty to enforce it. That the proceedings were to be governed by the practice and course of admiralty, not by the statutes or its analogies. That the state law will be observed as to all the conditions and provisions, attending the accruing or attaching, or determination of the lien. And that the Admiralty Court will enforce and carry out the lien as to priority of payment, in the same way as if it had been one under the maritime law. That only bottomry bonds and sailors' wages had a preference under such law over all others; and that material men, &c., took priority in the order of the arrest of the property subject to their liens, and not *pro rata*, nor in the order of their claims accruing.

With respect to mortgagees of the vessel, he held in the opinion first delivered, that a mortgage, being an incumbrance or positive hypothecation of the vessel, is paramount in privilege to liens acquired subsequently. The exceptions are the rights of bottomry holders and seamen. A similar doctrine was laid down by his Honor in the case of the *Kosciusko*. (11 Legal Observer, 38.)

The case was again brought before him, and he decided, that the court could not compel mortgagees to come in and take satisfaction of their mortgages; that it had no power to adjust a scale of equities between numerous suitors presenting distinct interests; and that it had no chancery power to compel creditors to yield legal rights, and give place to claims clothed with no more than an equitable character.

That the mortgagees had not submitted to the court, and the result in the case was, that the lien remained unaffected by the marshal's sale.

In the case of the *Steamboat Hendrick Hudson v. Cobb & Willard*, claimants, before Judge Hall, (7 Month. Law Rep. 93, June, 1854.) the following points were decided, after a full examination of the case of the *Angelique*.

That the custom of the lakes created a lien upon the vessel equivalent to a maritime lien, or privileged hypothecation.

That a common law mortgage, though recorded according to the law of the state, and filed under the Act of Congress, made prior to the accruing of such a lien, had no preference over it; but must be paid after such lien was discharged.

That a sentence and sale in admiralty wherever it had jurisdiction *in rem*, gave a perfect title to the purchaser against all the world; displaced every precedent or co-equal lien; and left the proceeds to be distributed and paid among rightful claimants. But it is consistent with this opinion, that if difficulties existed in adjusting such rights, which a Court of Admiralty could not satisfactorily meet, the proceeds, after satisfying the maritime liens, would be held by the court to be distributed by a proper tribunal.

Several instructive cases are cited to this point. The *Portsea*, (2 Hagg, 84;) the *Exmouth*, (Id. 88;) and the *Flora*, (1 Hagg, 298.)

In one, the proceeds were held subject to such an order as a court of common law or equity competent to settle the questions, might make. In another, the vessel had been seized by a sheriff, and was in his hands at the time that the warrant of arrest which issued from the admiralty, was executed; and the decree being satisfied, the surplus proceeds were paid over to the sheriff.

It is plain that, under such views, a receiver, who represented a mass of claimants under state laws, appointed by a court of competent jurisdiction, would present himself to the favorable consideration of a Court of Admiralty, and, I think, might urge strong reasons for a transfer of surplus funds to him, to be disposed of under the state laws, by a state tribunal. His union, also, with the marshal, in a sale, might be useful in attaining the most important object of making a perfect title.

And, again, upon the principles of Judge Betts, if the mortgagees do not intervene, and submit absolutely to the jurisdiction of the District Court, then the vessel would be sold, subject to their lien; and then I apprehend the lien would remain to be adjusted by a state court.

If, again, they do intervene, and submit, and are awarded a priority, it is done in opposition to the state law. A question may then be submitted to the District Court, whether, if a state court has obtained jurisdiction, in a suit commenced, as to such claim-

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ants, before they take any proceedings in the District Court, these claims should not be left to the state tribunal, and the state law.

I perceive, therefore, strong reasons, in every aspect of the case, for appointing a receiver, though with modified power.

Has the court the power to appoint one, under this complaint?

It is objected that the complainant has no right to file a complaint which, in truth, is one of foreclosure of a chattel mortgage. This objection is not tenable. I do not understand that the jurisdiction upon such a complaint is lost, although a sale, upon notice, has superseded the practice. (*Hart v. Ten Eyck*, 2 John. C. R. 100.)

It is, again, said that a subsequent mortgagee can only redeem a prior mortgage, and cannot obtain a sale. That this proposition is not universally true, is shown by the case of *The Western Insurance Company v. The Eagle Company*, (1 Paige, 284.)

It is insisted that a receiver cannot be appointed over a prior mortgagee in possession, nor upon the opposition of a prior mortgagee.

Elmore, the mortgagee, who took possession on the 1st of September, 1855, does not oppose the application, as mortgagee. Shaw had not possession. And it has been repeatedly decided that a subsequent mortgagee may have a receiver where a prior mortgagee is not in possession, without prejudice to his rights. (*Newman v. Newman*, cited, 2 Br. C. R. 92, Betts' ed. No. 7; *Bryan v. Cormick*, 1 Cox Ca. 422; *Dalmer v. Dashwood*, 2 Cox Ca. 378.)

I think there is no decisive objection to making the order for a receiver, with some qualifications as to the rights of the libellants in the District Court. The appointment of a receiver leaves all the rights of the parties to the action unprejudiced.

Justice Hoffman made an order which, exclusive of its recitals, reads thus:

It is ordered that Benjamin W. Bonney be, and he is, hereby appointed receiver of the said steamboat *Alida*, her tackle, apparel, and furniture, and of the rights, title, claims, and interests of all the parties in this action, other than the parties who have filed libels in the District Court of the United States, for the Southern District of New York, with the powers and modifications next expressed.

Thompson v. Van Vechten.

That such receiver in no wise interfere with the possession of such vessel now had by the marshal of the United States, or with that of any purchaser upon any sale which may be made under a sentence or decree of the District Court of the United States, for the Southern District of New York.

That in the case of the possession of such marshal being superseded by course of law, such receiver do thereupon take and hold possession of the same without prejudice to the right of the Sheriff of the County of New York, or of the defendant Parrott, to apply for such possession under the process issued from the Supreme Court, upon the application of the latter for an attachment.

That such receiver give notice, by service of a copy of this order or otherwise, to such marshal, of his appointment as such receiver.

That such receiver be at liberty to intervene in the suit or suits now pending in such District Court, on behalf of the parties in this action, other than those who have filed libels in such court, setting forth their claims respectively upon such vessel, and her proceeds, if sold, with his own appointment, and to seek such sentence or order as the said court shall see fit to make.

That such receiver be at liberty to unite with the said marshal in any sale which may be made, under a sentence or decree of the said District Court, so as to transfer to the purchaser the right, title, and interest of all the several parties hereto.

An appeal was taken from that order. The General Term, held by Oakley, Ch. J., and Campbell and Slosson, J. J., on the 22d of December, 1855, affirmed the order in all things, with this modification: That the order appealed from should be so modified as to declare that if the receiver intervened merely, without bonding, then "the intervention of the receiver in the suits so pending in said District Court, in pursuance of the liberty hereby given to him, shall not be construed as preventing the defendant, Prosper P. Shaw, from appearing in the said suits, and intervening therein for the protection of his own rights and interests, nor as withdrawing the rights and interests of any of the parties to this action, from the exercise of any jurisdiction which the said District Court may have acquired, and deem it necessary or expedient to exercise."

Mr. Bonney, the receiver, having intervened in the case of *John D.—V.*

Union Bank v. Torrey.

E. Brower, libellant, in the District Court, an exceptive allegation was filed as to his right, which was argued before Judge Betts, who sustained the intervention. In the case of *Cornell v. The Alida*, Judge Ingersoll made a similar decision. The receiver was held to be a proper representative of the mortgage, and execution creditors. Ultimately, the admiralty liens having been discharged out of the proceeds of a sale of the *Alida*, the surplus moneys were directed to be paid to the receiver, and the action in this court is now being prosecuted, to settle the various claims upon them.

THE UNION BANK OF SANDUSKY v. TORREY.

On the execution of a commission the parties have a right to appear by counsel. Cross-interrogatories cannot be withdrawn unless by mutual consent. A witness cannot shield himself from answering a cross-interrogatory by a reference to his previous answer to a direct one.

At SPECIAL TERM, November, 1855.

MOTION for a re-execution of a commission to examine witnesses.

A commission had issued in this action for the examination of witnesses at Sandusky, Ohio. The parties had united in the commission, and the defendants now applied for a re-execution of it, on the following grounds:—

I. That the plaintiff, on the first execution of the commission, had appeared by counsel, without having given notice to the defendant, or his attorneys, of his intention to do so.

II. That the plaintiff's cross-interrogatories, and the re-direct interrogatories on the part of the defendant, founded on the plaintiff's cross, had not been put to the defendant's witnesses, the counsel for the plaintiff having waived an examination, on his cross-interrogatories.

III. That several of the defendant's cross-interrogatories had been answered by a witness on the part of the plaintiff, only by a reference to previous answers given by him.

Mr. Pike, for defendant.

Mr. Chapman, for plaintiff.

DUER, J.—There is no weight in the first objection. The parties have the same right to appear by counsel on the execution of a commission as on the trial of a cause, and notice of their intention to do so is no more necessary to be given in the one case than in the other. Had there been an agreement that counsel should not attend, its breach might have laid a ground for this motion, but although the fact was suggested, the papers do not show that such an agreement was made.

The other objections that have been taken to the execution of this commission, I think have not been answered, and must prevail.

It was held by Mr. Justice Washington, (4 Wash. C. C. R. 324,) that cross-interrogatories cannot be withdrawn, unless by the consent of the adverse party. Walworth, Chancellor, (*Brown v. Davis*, 25 Wend. 259,) although he distinguishes this case from that then before the court, approves the decision. My brethren, whom I have consulted, all agree with me, that these authorities ought to be followed. A commissioner is, in a qualified sense, an officer of the court; in the execution of his trust he is bound to follow the instructions that are given to him, and from this duty he can only be relieved by the mutual consent of the parties, or of their counsel, given on the execution of the commission, and certified on its return.

The observation that the omission to cross-examine a witness can never work a prejudice to the party by whom the witness is called, when applied to the examination of a witness under a commission, is more specious than sound. It is not difficult to imagine cases in which the rights and interests of the party might be seriously affected by the omission. The direct interrogatories may not have been answered as explicitly and fully as they might and ought to have been. The answers to the cross-interrogatories might have supplied the defect, and these interrogatories may have been withdrawn in the belief that, if answered, such would be the consequence. It is at least possible, that such was the motive for withdrawing them in the case before me.

I am also of opinion that the answers of the plaintiffs' witnesses to several of the cross-interrogatories on the part of the defendant

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must be deemed insufficient, and ought not to have been received by the commissioner.

A witness upon a trial can never shield himself from a cross-examination by a mere reference to the answers which he had given when examined in chief. He is bound, when so required, to state again the facts to which he had testified. The veracity or recollection of a witness may well be tested, by requiring him to repeat, in all its details, a former narrative or statement, and it is a test which the adverse party has an undoubted right to apply. These rules, it seems to me, apply with equal force to the cross-examination of a witness under a commission.

The motion for the re-execution of the commission is therefore granted, with ten dollars costs to the defendant, to abide the event.

When he had delivered his opinion in the above case, Mr. Justice Duer said that he was instructed by the court to state, for the information of the bar, that when a commission has been returned, and opened so that its contents might with reasonable diligence have been known to the parties before the trial of the cause, a motion for its suppression or re-execution on the ground of its irregular or defective execution, must be made at chambers, and would not be entertained by the Judge upon the trial. The objections on the trial would be limited to the competency of the witnesses or the admissibility of their testimony.

CHATHAM BANK v. VAN VEGHTEN.

A complaint will not be set aside, although neither that nor the copy served was folioed as required by rule 41, if retained twelve days, without objecting to the defect. Such acceptance, and delay to object, waive the defect.

BOSWORTH, J., so held, on the 29th of December, 1855. The defendant retained the copy of a complaint twelve days without objection, and then moved to set it aside, because it was not folioed. Held, that the proper course was to refuse to receive it because it did not conform to the 41st rule, and that accepting and retaining it twelve days without objection, waived the defect.

WATSON v. FITZSIMMONS.

When the incipient proceeding to punish a party as for a contempt, is an order to show cause "why he should not be punished for the alleged contempt," and the contempt is denied, it is not essential to the validity of any final order that may be made, that interrogatories should be filed.

If a reference be ordered to ascertain and report the testimony and the facts, and both parties appear before the referee and submit evidence, the defendant cannot object on the final hearing upon the report, that no interrogatories had been filed and answered.

In proceedings supplementary to execution, the judgment debtor cannot be punished, as for a contempt, for refusing to deliver his property to the receiver, when the order appointing the receiver does not contain such a direction, and no subsequent order to that effect has been made.

At SPECIAL TERM, December 31, 1855.

THE plaintiff, a judgment creditor of the defendant, obtained an order supplementary to execution, in the usual form, dated the 18th of October, 1854. The defendant appeared and was examined, and on the 15th of February, 1855, a receiver of his property was appointed. On the 22d of October, 1855, an order was made on the papers annexed to it, that defendant show cause "why he should not be punished for the alleged misconduct," which was, that he had refused to deliver his property to the receiver, or why such further order, as was proper, should not be made. No order existed requiring him to so deliver his property to the receiver. On the 22d of October, on the return of that order, he denied the alleged contempt, and thereupon a further order was made referring it to a referee to examine the defendant and other witnesses, and take testimony and report the same, and whether the defendant was guilty of a contempt, either in disposing of his property contrary to the prohibitions of the order of the 18th of October, 1854, or in refusing to deliver his property to a receiver.

The referee examined the defendant and other persons, and took other testimony, and reported, as his opinion thereon, that the defendant was guilty of a contempt in both respects.

On the 27th of December, 1855, the plaintiff moved, before

Watson v. Fitzsimmons.

Bosworth, J., sitting at Special Term, on the referee's report and all the prior proceedings, for an order adjudging the defendant guilty of a contempt, in both respects.

Chas. H. Hunt, for plaintiff.

F. H. P. Bryan, for defendant,

Insisted that the Judge or court had no power to make the order applied for, on the papers before him. That a party, denying an alleged contempt, cannot be adjudged guilty of it, until after interrogatories had been put to, and been answered by him. That the most that could now be done, was to order interrogatories to be filed and answered, or an attachment to be issued. The other points discussed, related rather to the merits, than to the proper mode of proceeding.

BOSWORTH, J., held, that 2d R. S. 536, § 5, prescribes two modes of proceeding: one, an order to show cause why the defendant "should not be punished for the alleged contempt;" the other, "an attachment to arrest such party, and to bring him before such court to answer for the alleged contempt." The statute is silent, when the mode first named is adopted, as to the course to be thereafter pursued, whether the defendant appears or fails to appear. It may, therefore, be such as conforms to the general practice of the court upon any order to show cause why relief should not be granted.

Section 19, (2 R. S. 587,) which requires written interrogatories to be filed, and written answers, on oath, to be made to them, by its express terms, relate to a "defendant arrested upon an attachment." That is also a proper course when a defendant appears upon an order to show cause why he should not be punished, but the statute does not, in terms, require it, in such a case. (2 Sand. S. C. R. 727 and 728.)

This proceeding is one had in the action in which the judgment was recovered, and § 271, sub. 3, authorizes a reference in such a case. The order of reference was clearly not void, and the defendant not having appealed from it, but, on the contrary, having been examined under it, cannot object now, to its validity or regularity, nor to that of proceedings regularly had under it.

Pratt v. Hoag.

For good cause, the court in its discretion, might send the matter back to the referee to take further testimony, but no such application is made.

The proceedings are regular, and the defendant must be adjudged guilty of a contempt, in having disposed of his property in violation of the injunction contained in the order of the 18th of October, 1854. The order of reference directed an investigation of that matter, and the defendant cannot now object that it was not specified in the order to show cause.

But in refusing to deliver his property to the receiver, he has not disobeyed any order of the court, for none has been made requiring him to so deliver it. He refused to do that which it was his duty to do; but that was a duty resulting from a change of title to the property produced by the appointment of a receiver, and not from an order which he had refused to obey. To punish, as for a contempt, for refusing to deliver property to a receiver, an order requiring such delivery is a necessary pre-requisite. The Judge imposed a fine on the defendant, for having disposed of his property contrary to the order of the 18th of October, 1854. (On appeal to the General Term, the order was affirmed.)

PRATT v. HOAG.

The court has no power to order a *lis pendens* to be taken from the files of the court, which is in proper form, and has been filed in an action in conformity with the provisions of the statute.

Although an injunction, which had been granted, and which restrained the defendant from disposing of the real estate sought to be charged by the action, has been dissolved, on the defendant's depositing in court a specific sum of money, as security for the payment of any judgment the plaintiff might recover; the *lis pendens* will not be ordered to be taken from the files of the court, notwithstanding its continuance may defeat a contract for the sale of the real estate, which the defendant may have made after the injunction was dissolved. A plaintiff may give actual notice of his claim to any person who contemplates purchasing, and he may give such a notice as the statute authorizes.

At SPECIAL TERM, January, 1856.

THE complaint makes a case for an accounting between the parties, in respect to the proceeds of the sales of two houses and lots

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in the city of New York, in which they were jointly interested—claims a balance due the plaintiff, and prays for an accounting, &c.

It charges that a house and lot, on the Third avenue, in New York city, was bought, and paid for in part, with such proceeds, and conveyed to the defendant, and seeks to have such house and lot disposed of, if necessary, and proceeds applied to pay such balance as may be adjudged to be due to the plaintiff. An injunction was granted, prohibiting the defendant from disposing of this house and lot, until the further order of the court, and a *lis pendens*, in proper form, was filed with the clerk of the county.

The injunction was dissolved on the 13th of December, 1855, by order of the court, on the defendant's giving security approved by the court, in the sum of \$1,600, to account for the proceeds of said Third avenue house and lot.

The defendant contracted to sell and convey the house and lot, and the purchaser refused to complete his contract on account of the pendency of this action, and the *lis pendens*. The defendant now moves for an order, that the *lis pendens* be taken from the files of the clerk of the city and county of New York.

David P. Whedon, for defendant,

Insisted that the giving of the security, on which the injunction was dissolved, conferred the right to sell the property without any embarrassment to giving a good title, to result from this action, and the proceedings therein; and that the defendant acquired thereby an equitable right to have the *lis pendens* taken from the files of the clerk of the county.

Robert H. Shannon, for plaintiff,

Contended that the court had no power to grant the motion. That the security was a substitute for the injunction, and that only.

BOSWORTH, J.—The filing of a *lis pendens* is an ordinary proceeding in an action, in which it is sought to subject specific real estate to the operation of any judgment that may be recovered.

It is indispensable, in order to affect persons who may purchase *pendente lite*, in ignorance of the plaintiff's claim, that it should be

filed. All who take the title after a notice, in proper form, has been filed with the proper officer, take it with the same consequences that would have resulted from a purchase with actual notice.

If no injunction had been granted, the filing of a *lis pendens* would have secured the plaintiff such rights to it in the hands of the purchaser, as might have existed against the defendant if he had continued to own it. If the plaintiff succeeds in establishing that he is, in equity, a part owner, and that full relief cannot be secured except by a sale of it, and payment to himself of such part of the proceeds as may be required to satisfy his just equitable claim, the filing of the *lis pendens* will enable the plaintiff to obtain the same relief, though the property may have been conveyed *pendente lite*.

Although the *lis pendens* is an ordinary proceeding, yet it is, in this state, the subject of statutory provisions. (2 R. S. 174, § 48; Code, § 182.)

The court has certainly no power to prevent the plaintiff from giving actual notice, if he can, to every person who may propose to purchase. I cannot imagine any principle on which it can prevent him from giving notice in the way the statute has provided. It cannot rightfully interfere, to take from the files of the clerk of the county a paper, in proper form, and regularly filed under the authority of a statute, which is a notice, in law, to all who may purchase.

The right also existed to obtain an injunction, on presenting a case which entitled the plaintiff to it. A case was made on which the court deemed it just to grant that relief. The court, subsequently, permitted the defendant to substitute security for the injunction, and, on the security being given, dissolved the injunction. When the court made the order dissolving the injunction, neither the court nor the defendant knew of the *lis pendens*, although it had been filed months previously thereto. That order, therefore, in contemplation of the court, as in contemplation of law, was security substituted for the injunction, and that only.

I think the motion should be denied, on the ground that the court is incompetent to grant the relief sought by it.

The motion is denied, with \$7 costs.

The REPUBLIC OF MEXICO v. FRANCIS DE ARANGOIZ.

A republic, acknowledged as such by our own government, is an independent sovereign power, and, therefore, a state just as certainly, and in the same sense, as a monarchy, limited or absolute.

A state is a moral person, having an understanding and a will, capable of possessing and acquiring rights, and of contracting and fulfilling obligations.

As a state is a person possessing rights which the law defines and may enforce, its competency to assert those rights in a court of justice, in every country where their assertion may be necessary, inevitably follows. It has the same right to sue for the recovery of a debt as an individual creditor, and the same right to sue by its appropriate name, that which designates its being and character as a state, as a foreign corporation by its corporate name. The denial of this right to a foreign state, acknowledged as such by our own government, and with whom we are at peace, would be a grave subject of remonstrance and complaint, and might even be deemed a just cause of war.

When a foreign state is the plaintiff, an undertaking accompanying an order of arrest, signed and acknowledged by its resident minister, on the part of the plaintiff, is a valid undertaking within the provisions of the Code.

A person who has received money in a fiduciary capacity is liable to be arrested, although it is not stated that he had embezzled or fraudulently misapplied the sum claimed in the action.

When an order of arrest is founded on extrinsic facts, wholly unconnected with the right of the plaintiff to maintain the action, the burden of proof, when a motion to vacate the order is made, rests upon the plaintiff; and if the facts are positively denied, and the question, upon the whole evidence, of the defendant's liability to the arrest, remains in doubt, he is entitled to his discharge. But when the facts relied on in support of a motion to vacate an order of arrest constitute a defence to the action, that, if proved, would bar a recovery, the burden of proof is on the defendant, and if he fail to satisfy the court that the defence will certainly be established on the trial, the application for his discharge will be denied.

The court has no right to say, where the evidence is conflicting and doubtful, that the plaintiff cannot recover, when it is solely upon the truth of this proposition that a motion to vacate an order of arrest is founded.

At GENERAL TERM, January, 1856. Before all the Judges.

APPEAL from an order made by Mr. Justice Hoffman, denying a motion, on the part of the defendant, to vacate an order of arrest, but reducing the sum in which the defendant was to be held to bail from ninety to thirty thousand dollars. Both parties appealed; the plaintiff on the ground that the bail ought not to have been

reduced; the defendant, that he ought to have been wholly discharged.

The affidavit upon which the order of arrest was founded, was made by Juan N. Almonte, minister plenipotentiary of the republic of Mexico, and stated, in substance, that on behalf of his government, he had placed in the hands of the defendant, as an officer and agent of the government, a sum exceeding six millions of dollars, to be paid over by him, when, and as requested; but that he retained, and had refused to pay over, although duly requested, the sum of \$68,288 $\frac{17}{100}$, upon a groundless claim that he was entitled to that sum for his commissions; that when the moneys were placed in his hands, he was an officer of the government of Mexico, receiving a fixed salary, and that by a law of that republic, every such officer was prohibited from receiving any compensation, for services performed by him under the orders of his government, beyond the amount of his salary.

The undertaking taken and approved by the Judge who granted the order of arrest, was signed and acknowledged by Juan N. Almonte, minister plenipotentiary, on the part of the plaintiff, and by two sureties.

The motion to vacate the order was founded as well on the alleged insufficiency of the affidavit and undertaking, as on affidavits tending to show that the defendant acted as a special agent, and not as a salaried officer, in receiving and paying over the moneys that had been entrusted to him, and was fairly and fully entitled to the sum which he retained, as a commission for his services. There were counter affidavits, on the part of the plaintiff, denying many of the material facts alleged in those of the defendant, and showing (*inter alia*,) that his claim for commissions had been rejected by the government of Mexico.

The grounds upon which it was insisted that the order of arrest ought to be vacated, were:

First. That the republic of Mexico had not a legal capacity to maintain the action in its own name.

Second. That the undertaking was not executed by the plaintiff, and was, therefore, void.

Third. That the affidavit was insufficient, as not showing that the moneys, sought to be recovered, had been embezzled or fraudulently misapplied by the defendant; and,

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Lastly. That the affidavits, on the part of the defendant, ought to satisfy the court that there was no fraudulent intent; and raised a question of his probable right to detain the moneys that were claimed, which it was the province of a jury to determine; and that, in all cases where the grounds of fraud are fully denied, and a fair question of right for a jury is presented, an order of arrest falls, in the same manner, and for the same reason, as an injunction order.

J. Anthon, for the defendant.

D. Lord, for the plaintiff.

BY THE COURT. DUER, J.—The objection that the republic of Mexico has not a "*locus standi in judicio*," or, in the words of the Code, "a legal capacity to sue," is very far from commanding our assent. That a foreign monarch, or a foreign corporation, may maintain an action in the courts of this state—the monarch, in his name of soereignty, the corporation in its corporate name—is not denied; but the monarch, we are told, is a natural, the corporation an artificial, person, and that it is from this personality that the legal capacity of each to sue is derived. A republic, however, it is contended, possesses no such attribute. It is neither a natural, nor an artificial person. It is a mere abstraction, an appellation, and nothing more, not representing or denoting any person or body upon whom process may be served, or for, or against, whom a judgment may be rendered. And we were referred to the case of the *Republic of Colombia v. Rothschild*, (1 Simons 106,) as a conclusive authority, as in that case a demurrer to the bill, it is said, was sustained by the vice-chancellor, upon the exact grounds that have been stated.

We have been unable to yield our conviction to the argument, or to the authority cited in its support.

The argument rests entirely upon an assumption, which, it appears to us, is certainly groundless; the assumption that personality cannot be truly predicated of a republic. A republic, acknowledged as such by our own government, is an independent sovereign power; in other words, a state, just as certainly, and in the same sense, as a monarchy, limited or absolute; and every state

is a person, an artificial person, in a more extensive and far higher sense than an ordinary corporation. A state, whatever may be the form of its internal government, and by whatever appellation it may be known, is, in the language of Vattel, "a moral person, having an understanding and a will, capable of possessing and acquiring rights, and of contracting and fulfilling obligations." (Vattel, *Droit des Gens*. liv. 1, c. 1, § 4; vide, also, Wheaton's Elem. of Interna. Law, vol. 1, c. 2, §§ 1 & 2.)

The definition given by other writers on the law of nations, is substantially the same, and, indeed, it is upon the truth of this definition that the whole science of international law is founded—since it is evident, that it is only upon persons, having an understanding and a will, that law can operate. Every valid law implies the duty of obedience, and it is only by persons that obedience can be rendered.

As a republic, therefore, as a state, possesses rights which the law has defined, and which, consequently, the law may enforce, its competency to assert its rights in the tribunals of every country in which their assertion may be necessary, it seems to us, is a necessary consequence. If the moneys which are claimed in this action, in reality belong to the state of Mexico, we can see no reason to doubt that it has exactly the same right, as an individual creditor, to demand the aid of the court to compel their payment; nor can we doubt, that it has exactly the same right, as a foreign private corporation, to prosecute an action for that purpose by its appropriate name; the name by which its being and character as a state are designated and known. No reason has been, nor as we believe, can be assigned, why the intervention of a natural person, within the jurisdiction of the court, and subject to its process, as the nominal plaintiff in the suit, should be required, in the one case, more than in the other.

Nor shall we limit ourselves to this modified expression of our views. We are satisfied, that to deny to any foreign state, whose independence and sovereignty as such are acknowledged by our own government, and with whom we are at peace, the right to prosecute its just claims in a court of justice, when it is only by the aid that the court is required to give, that its claims can be enforced, would be something more than a breach of national comity, and even something more than a violation, if not of the

terms, of the spirit of our federal constitution. As an arbitrary denial of justice, it would furnish a very grave subject of remonstrance and complaint, and, in the opinion of Lord Redesdale, might even be deemed a just cause of war.

We have examined, with attention, the case of *The Republic of Colombia v. Rothschild*, upon which the learned counsel for the defendant so strongly relied, and are convinced that the judgment of the court did not at all proceed upon the distinction between a suit by a monarch, and a suit by a republic, upon which the counsel insisted. It was not, because the plaintiff was a republic that the demurrer was allowed, but the doctrine upon which the Vice-Chancellor placed his decision was far broader than that which the counsel asserted, or would have ventured to maintain. To prove this the exact words of the Judge shall be quoted. They are, that "a foreign state must sue in the name of some public officers who are entitled to represent the interests of the state, and upon whom process can be served on the part of the defendant, and who can be called upon to answer the cross-bill of the defendant," language amounting to a plain denial of the right of any foreign state to sue in its own name, but requiring that, in all cases, the action shall be brought by and in the name of some person acting on the behalf and under the authority of the state, and who is within the jurisdiction of the court, since it is only upon such a person that its process can be effectually served, and who can be made to answer a cross-bill. The reasons, therefore, which the Vice-Chancellor—a judge far more remarkable for the rapidity than the accuracy of his decisions*—assigned for his doctrine, it seems apparent, are just as applicable to a suit by a foreign king, and even by a foreign corporation, as to a suit by a republic, and, if admitted to be valid, would prove that, in all these cases, the nominal plaintiff must be a natural person, within the jurisdiction of the court.

We deem it needless to cite authorities to show that no such doctrine as this now prevails, or has ever prevailed, in any court of law or equity in England. *The Republic of Colombia v. Rothschild* is the single case in which it has ever been advanced. We cannot, there-

* SIR JOHN LEACH.—The distinction between Lord Eldon and Sir John Leach was said to be that it was the custom of the first, "*oyer sans terminer*," and of the second, "*terminer sans oyer*."—(Lord Campbell's Life of Lord Eldon.)

fore, agree with our learned brother, from whose order this appeal is taken, that the rule laid down in that case has received the sanction of Lord Eldon, Lord Redesdale, and Lord Brougham.* On the contrary, we are of opinion, that by the decision of the House of Lords in the case of *The King of Spain v. Huttill*, (1 Dow. & Clark, 164,) it was meant to be and is distinctly repudiated and overruled. The defendant in that case demurred to the bill which was brought by the King of Spain, not as a natural person, but in his political capacity. The Lord Chancellor, Lyndhurst, overruled the demurrer, and the appeal to the House of Lords was from his decision. It appears from the report that the first ground for demurrer that was assigned, and that which was mainly relied on, was this: "That a foreign sovereign ought not to be allowed to sue in a Court of Equity, inasmuch as by no possibility could process be issued with effect, or equity be done, or a decree be enforced against him." It seems to me, that this is an exact repetition of the doctrine of the Vice-Chancellor in *The Republic of Colombia v. Rothschild*, and, consequently, if this doctrine had been followed, the decision of the Chancellor would have been reversed, and the bill have been dismissed. The doctrine, however, instead of being followed, was expressly disclaimed. The decision of the Chancellor, by the unanimous judgment of the law Lords, was very promptly affirmed, and, in delivering his opinion, Lord Redesdale said: "I have no doubt that a foreign sovereign may sue; otherwise there would be a right without a remedy. He sues here on behalf of his subjects, and if foreign sovereigns were not allowed to do that, the refusal might be a cause of war." We hold, without hesitation, that this language is just as applicable to the case before us, as to that in which it was uttered. A republic is as truly a sovereign power as a king, and as the king sues by his name of sovereignty on behalf of his subjects, so the republic sues by its name of sovereignty on behalf of its citizens. The right to sue is as clear; the refusal to permit a suit would be as indefensible, in the last case, as in the first.

The first objection to the order appealed from is, therefore, overruled. The second ground upon which it is insisted that the order of arrest ought to be vacated is, that the undertaking not being

* Vide *Republic of Mexico v. Arangoiz*. (11 How. Pr. Rep. p. 1.)

executed by the plaintiff, is not in the form that the Code requires; and the case of *Richardson v. Craig*, (1 Duer, 666,) was referred to as showing the necessity of such an execution. It was undoubtedly held in that case, that an undertaking signed by sureties alone was not valid under section 182 of the Code. It must be so executed as to be binding on the plaintiff; but we have not said that an undertaking, binding on the plaintiff, may not be executed by a person having full authority to act on his behalf. Here it is proved that the minister of the republic, M. Almonte, has been expressly instructed by his government to prosecute the present action, and we think that the authority thus given to him carries with it an authority to take any legal proceeding in the progress of the suit, in the name and on behalf of the plaintiff, which, in his judgment, may be necessary to its successful prosecution.

It was justly observed by the counsel for the plaintiff that an undertaking by a foreign government can only be binding on its good faith; and we are satisfied that the good faith of the republic of Mexico is as fully pledged by the undertaking signed and acknowledged by its accredited minister, in his official name, as it would be by any form of obligation that could be adopted. To hold the undertaking to be void, would be in effect to say that in an action, where a foreign state is the plaintiff, no order for the arrest of the defendant can be made, because no undertaking can be given creating an obligation on the plaintiff, that may be enforced by law. This we will not say, and must, therefore, hold the undertaking to be sufficient.

The next objection to the validity of the order is, that it is not stated in the affidavit upon which it was founded, that the defendant has "embezzled or fraudulently misapplied" the moneys which he received as agent of the plaintiff, and which are now sought to be recovered. The reply to the objection is, that according to the construction which this court has uniformly given to the 2d subdivision in section 179 of the Code, no such statement was necessary to be made. We have uniformly held, and, until overruled by a higher authority, must continue to hold, that to render an agent liable to arrest, all that is necessary to be shown is, that he received the moneys of his principal, for the recovery of which the action is brought, in "a fiduciary capacity," and that he must be deemed to have received them in that capacity

when it appears that he had no authority to disburse them on account of his principal, but was bound to pay them over on request. All these facts are very clearly stated in the affidavit upon which the order was granted, and, in our opinion, the effect of the statement is not at all weakened or altered by the admission, that the defendant claims that he is entitled to retain the whole sum now in his hands as a compensation, in the nature of a commission, for his services. Whether this claim be valid or not, it is not the less certain that the whole sum when he received it, belonged to the plaintiff, and that its payment over to the plaintiff, according to the statement in the affidavit, might have been instantly demanded. The objection to the sufficiency of the affidavit is, therefore, untenable.

Lastly. It has been earnestly contended, that the defendant is entitled to be wholly discharged upon the facts set forth in the affidavits that have been read on his behalf. It is not denied, that the facts which are relied on as showing that the defendant has a just title to the whole sum which he retains, and consequently, that the plaintiff is not entitled to maintain the action, are distinctly controverted in the counter affidavits on the part of the plaintiff. Nor is it pretended, that the title of the defendant to the commissions which he claims is, upon all the evidence before us, so conclusively established, as to justify us in anticipating the decision of a jury, by declaring that the plaintiff cannot be entitled to recover. All that is asserted is, that, taking into consideration the affidavits on both sides, they raise a fair question for the determination of a jury, and a question which a jury alone is competent to determine; and the argument for the defendants, therefore, so far as the merits are concerned, rests entirely on the assertion, that whenever the affidavits produced render it doubtful whether the plaintiff can recover in the action, a defendant who has been arrested is entitled to his discharge.

The argument entirely overlooks an important distinction, and is founded, we think, upon an erroneous construction of the provisions of the Code, and of the rules that ought to govern us in carrying its provisions into effect.

It is undoubtedly true, that when an order of arrest is founded upon extrinsic facts, wholly unconnected with the right of the plaintiff to maintain the action, as that the debt sought to be re-

covered was fraudulently contracted, the burden of proof rests upon the plaintiff, and consequently, if the affidavits on the part of the defendant, when a motion is made to vacate the order, deny positively the imputed fraud, and the question whether any was committed, or intended, upon the whole evidence, remains in doubt, the defendant will be entitled to his discharge. It will be the duty of the court to determine the question precisely as it ought to be determined were it submitted to a jury.

But when the facts relied on, in support of a motion to vacate the order, constitute a defence to the action, that if admitted or proved, would bar a recovery, it is the defendant, who, in relation to these facts, holds the affirmative, and it is upon him, therefore, that the burden of proof is necessarily cast; and hence, if he fail to satisfy the court that the defence relied on will certainly be established on the trial, it seems to us clear, that the application for his discharge ought to be denied. The court has no right to say, upon doubtful evidence, that the plaintiff cannot recover in the action, when it is solely upon the truth of this proposition, that the application for the discharge of the defendant is founded.

The application of these remarks to the case before us is obvious and decisive. We hold that the proof is conclusive, that the money, which the plaintiff seeks to recover, was received by the defendant in a fiduciary capacity; nor can it be said, that the facts upon which we rest this opinion, are denied by the defendant. He was, therefore, liable to be arrested, and cannot be discharged from the arrest unless he has shown, to our entire conviction, that he has a valid defence to the action; and it is certain that he has no such defence, unless he has proved that he has a just and legal title to the sum which he retains, as a commission, for receiving and paying over the residue of the large fund that was placed in his hands. His claim for a commission, however, is certainly groundless, if, when he received the fund he was a salaried officer of the government of Mexico, and was prohibited, by a law of the republic then in force, from receiving any compensation for any services he might be directed to perform, beyond the amount of his salary; and it is exactly in relation to these facts, that the evidence before us is, in no ordinary degree, conflicting and doubtful. It is impossible for us to say, upon the evidence before us, that the republic of Mexico is not entitled to recover the whole

The Same v. The Same.

sum for which judgment is demanded, and it is only the clearest proof that it is not entitled to recover any portion of that sum, that could justify us in discharging the defendant. We are convinced, that we ought not, upon affidavits alone, to pass upon the merits of a controversy, that it will be the province of a jury to determine, unless the proof that is furnished is not merely sufficient, but conclusive; and it is not pretended that such is the character of the proof that the defendant has given.

The order of Mr. Justice Hoffman, so far as the appeal of the defendant claims its reversal, must, therefore, be affirmed.

We have also concluded, although with much hesitation and doubt, to affirm that part of the order from which the plaintiff has appealed, but in doing so, we are not to be understood as assenting to the views by which Mr. Justice Hoffman, in reducing the amount of the bail that was originally required, appears to have been governed. Whether the defendant is entitled to the whole, or any part, of the commissions which he claims, is a question upon which we do not mean to express or intimate an opinion.

Order affirmed, no costs to either party.

The SAME v. The SAME.

When a responsible attorney appears for a party, the court will not ordinarily inquire into the fact whether he was actually authorized to appear or not.

To warrant such an inquiry circumstances must be shown calculated to raise a suspicion of fraud, or of an attempt to impose upon the adverse party, or to abuse or pervert the process of the court.

The mere fact that another action for the same cause has been brought in another state or country, furnishes no reason for the discontinuance of that previously commenced in this court.

When the accredited minister of a foreign state declares that he is acting under the authority of his government, no court of justice, nor even the government to which he is accredited, can rightfully demand a copy of his instructions.

At GENERAL TERM, January, 1856. Before all the Judges.

APPEAL by the defendant from an order made by Bosworth, J., discharging an order on the plaintiff, to show cause why the authority for commencing this action should not be produced, and filed with the clerk of this court, under the oath of the party, who

may claim to be so authorized; and also why all instructions to continue or discontinue the same, should not in like manner, be produced and filed; and why, upon default in the premises, or the absence of authority to commence or continue the prosecution of this suit, the same should not be dismissed, or the defendant have such other relief as may be just.

The order to show cause was founded upon an affidavit of the defendant, stating, in substance, that since this suit was commenced the republic of Mexico had caused another action for the same subject matter, to be commenced against him in the said republic, and that the same was then depending; and that he had reason to believe, and did believe, that this suit was prosecuted against him without authority from the republic. The affidavit also stated that the defendant was informed and believed that the suit was brought and prosecuted against him by the direction of the minister-plenipotentiary of the republic.

The Judge below, when he discharged the order, delivered the following opinion:—

BOSWORTH, J.—When a respectable and responsible attorney appears for a party, the court will not ordinarily inquire into the fact whether he was actually authorized to appear or not. (*Denton v. Noyes*, 6 J. R. 296.)

When no circumstances are shown calculated to raise a suspicion of fraud, or of an attempt to impose upon a party, or to abuse or pervert the process of the court, even the mere fact of authority will not be investigated. In this case the fact of actual authority having been given is sworn to. The position of the party to the plaintiffs and to the defendant, in this transaction, to whom the authority was given, and by whose orders the action was brought, is such as to repel all suspicion or presumption that no such authority has been given, as he swears he has received.

There is nothing opposed to the positive affidavit of the minister-plenipotentiary of the republic of Mexico, but the affidavit of the defendant, that he has reason to believe and does believe, that this suit is prosecuted against him without authority from the said republic.

No fact is stated on the part of the defendant as the basis of his belief, nor are any of the reasons of the belief mentioned.

Whether the court would require evidence of the authority to be filed before entry of the judgment, or at the time of entering it, as a greater protection to the defendant, it is unnecessary to decide now. No facts are stated to render it the duty of the court to require it to be filed, in the present state of the action.

No satisfactory reason is assigned for requiring any instructions that may have been given, as to continuing or discontinuing the action to be filed. To make such an order would be equivalent to requiring an attorney to disclose the orders given him, as to the conduct of the suit, and the contingencies on which he should abandon it.

No authority is cited in support of such a practice, and an attempt of the court to interfere in that manner, with the ordinary course of litigation would naturally be viewed with some suspicion.

The mere fact of the commencement of an action in another state, after this was brought, and its pendency, is no reason for ordering it to be discontinued. It is not averred that the defendant has been personally served with process in that action, or that he has ever appeared in it.

It is not averred that he has been arrested in it, or that any of his property has been attached by any proceedings taken in it, or that he has any that can be reached, by any proceedings that can be taken in it.

If a judgment should be rendered in that action by which the rights of the parties would be concluded before the one pending here is tried, this court would permit the judgment there to be pleaded *puis darrein* continuance, or by supplemental answer.

If the two suits should proceed *pari passu*, to judgment and execution, it would order the one recovered here satisfied, on payment of the one recovered in Mexico.

So it would make any order proper, and adequate to protect the defendant, on a state of facts being presented that called for its interference.

Nothing is shown on this motion rendering it necessary or expedient for the court to make any order interfering with the ordinary modes of procedure in such an action. The motion must therefore be denied, with seven dollars costs.

Saltus v. Kipp.

J. Anthon, for the defendant.

D. Lord, for the plaintiff.

BY THE COURT. DUER, J.—We are all of opinion that the order from which this appeal is taken must be affirmed, with costs, and for the reasons that Mr. Justice Bosworth has clearly and fully stated. To those reasons we have only to add, that, to demand from the accredited minister of a foreign state, who declares that he is acting under the authority of his government, a copy of the instructions given to him, would be, in our judgment, to insult him and the government which he represents. When his character as a minister-plenipotentiary, received as such by our own government, is admitted or proved, we are bound to accept his declaration as conclusive proof of his authority. The instructions of such a minister are only for his personal direction. Not even the government to which he is accredited can demand a copy or sight of them; and he violates his duty to his own government in making the communication without its direction or authority. (*Manuel Diplomatique*, ch. 2, § 16; Wheaton's *Internat. Law*, vol. 1, p. 268, § 9.)

The order appealed from is affirmed, with ten dollars costs to the plaintiff.

SALTUS v. KIPP.

In an action of assault and battery, in which the defendant has given notice of appearance before the time for answering has expired, it is irregular to apply *ex parte*, and without notice, for an order that plaintiff's damages be assessed by a jury.

In such a case, the defendant will not be permitted to put in an answer which admits the assault and battery, and merely alleges that there was provocation, which should mitigate damages. The real character of the transaction, and any matter which can properly mitigate damages, may be shown on the assessment of damages, on a default to answer.

At SPECIAL TERM, January, 1856.

THIS is an action of assault and battery. Within twenty days after service of the summons and complaint, the defendant ap-

peared by attorney, but made default in answering. When the time to answer had expired, the plaintiff applied *ex parte*, and obtained an order that his damages be assessed by a jury. The defendant moves to set aside that order for irregularity, and for leave to put in an answer, which he produces. The answer does not deny the assault and battery, but sets up circumstances mitigating its character.

Henry H. Morange, for defendant.

Bangs & Ketchum, for plaintiff.

BOSWORTH, J.—The order to assess damages could only be granted on an application for the relief demanded by the complaint. No notice of the application having been given, it is irregular, and must be set aside. (Code, § 246, sub. 2.)

The answer contains no defence. On a demurrer to it for insufficiency, judgment would be given for the plaintiff. (Laws of 1855, chap. 44; *Lane v. Gilbert*, 9 How. Pr. R. 150.) In such a case, the damages would be assessed in the same manner as if no answer had been put in. (Code, § 269.)

The same proceedings may be had under the Code, in assessing damages on a default to answer, as were allowed under the old practice of executing a writ of inquiry. A defendant may call witnesses, and prove any matter which properly goes to mitigate damages. He may, of course, prove all the facts and circumstances relating to any immediate provocation, which, in judgment of law, tends to mitigate damages. (Code, § 469.)

The motion for leave to put in the proposed answer is denied.

Cunningham v. M'Gregor.

CUNNINGHAM, assignee, v. M'GREGOR.

A general assignee, for the benefit of creditors, is a trustee of an express trust. If he fails, in an action brought by him as such assignee, to recover a debt claimed to be owing from the defendant to his assignor, he cannot be charged personally for the costs, unless the court specially so orders, on the ground of his mismanagement or bad faith in such action. The costs are chargeable upon, and collectable out of the assigned estate.

The same rule of liability for costs applies to him that is applicable to executors or administrators.

It is not bad faith to prosecute a suit against the only responsible debtor of the assignor, without having funds to pay the costs of it, if unsuccessful, if the plaintiff believes, and has good reason to believe, that he is justly entitled to recover.

At SPECIAL TERM, January, 1856.

THE plaintiff is an assignee, under an assignment executed to him by J. H. & J. D. Lyon, of their property, in trust, to pay their creditors. As such assignee, he brought this action to recover a balance alleged to be owing from the defendant to the assignors at the time of the assignment. The defendant obtained a report of a referee in his favor, and now moves for an order directing the costs to be paid by the plaintiff personally. The assignors assured the plaintiff that the balance sought to be recovered was due from the defendant. Defendant's affidavits state, (and this is not denied,) that the plaintiff had no funds with which he could pay the costs, if unsuccessful, when he brought the suit; and that at that time the plaintiff knew the assigned estate was insufficient to pay the costs of this action, and that he commenced the action without first asking the defendant to pay, or communicating with him on the subject.

Hoffman & Pirson, for plaintiff.

Robert H. Shannon, for defendant.

BOSWORTH, J.—The plaintiff is a trustee of an express trust. The Code puts such a trustee on the same footing as an executor or administrator, in respect to the costs of an action brought by

or against him. Such a trustee necessarily prosecutes by virtue of his rights as trustee. (Code, §§ 111 and 113.) In such an action, if unsuccessful, the costs of the defendant can only be charged upon, or collected out of the estate he represents. (Code, § 317.)

The same rules must be applied to his case as are applied in actions necessarily brought by executors or administrators in their representative capacity. The Code allows of no discrimination between them. He cannot be charged personally, except for "mismanagement or bad faith in such action or defence." (Code, § 317.)

Being assured by the assignors that the balance claimed was justly due, and believing this assurance to be true, and therefore suing, he prosecuted in good faith. The fact that the defendant was, or might have been the only responsible person among the alleged debtors of the assignors, and that the estate might not be sufficient to pay the costs of this action, if successfully defended, is not sufficient to charge the defendant with bad faith in bringing the action. It was, in such a case, as much the duty of the plaintiff to attempt to collect this balance, if he believed the claim to be a just one, as it would have been if there had been other debtors who conceded their liability, and who were abundantly able to pay.

The fact, that no application was made to the defendant before suit was brought, does not necessarily show bad faith: it may have been discourteous. All the affidavits, taken together, show that the plaintiff believed, when he brought the suit, and throughout its progress, that he was entitled to recover.

There cannot be said to be bad faith in bringing, or prosecuting to a conclusion, any action in which the plaintiff honestly believes, and is advised by counsel, that he is entitled to recover. He cannot, therefore, be charged personally with the costs of this action. (See 2d R. S. 615, §§ 16, 17; Graham's Prac. 737-739.)

The motion is denied, but without costs.

PARSONS, appellant, v. TRAVIS, et al., respondents.

When a plaintiff, against whom a judgment has been recovered, appeals from it to the General Term, and, on appealing, deposits \$250 instead of giving the undertaking required by the Code, and the judgment is affirmed by the General Term, and also by the Court of Appeals, on an appeal to the latter, and pending the latter appeal the money, so deposited, is lost, stolen, or embezzled, without any act of the respondent contributing to produce that result, the loss is that of the depositor, as between him and the respondent.

The court will not direct the amount of the deposit to be deducted from, nor the judgment satisfied on payment of the balance, or difference.

At SPECIAL TERM, JANUARY, 1856.

JUDGMENT was rendered in favor of the defendants for their costs of the action. The plaintiff appealed from it to the General Term. Instead of giving an undertaking on such appeal, he deposited with the clerk, the sum of \$250. The judgment was affirmed at General Term, and from the latter judgment he appealed to the Court of Appeals. On the latter appeal, he gave an undertaking, in the form and for the amount required to make the appeal operate as a stay of all proceedings, on the judgment appealed from, pending the appeal. Having done that, he moved the court for an order, directing the clerk of the court to pay to him the \$250, deposited on appealing from the Special to the General Term. That motion was opposed by the defendants, and denied. (2 Duer, 659.) The Court of Appeals affirmed the judgment rendered by the General Term of this court.

In the mean time, the \$250 has been wholly lost, without any fault of the plaintiff or either of the defendants. The plaintiff now moves for an order that the \$250 be deducted from the judgment, entered on the remittitur from the Court of Appeals, and that, on payment of the balance, it may be satisfied of record.

John Graham, for plaintiff and appellant.

R. J. Dillon, for defendants and respondents.

BOSWORTH, J.—The payment, by the plaintiff, of \$250 into court, was a voluntary act on his part. It was a substitute for an undertaking executed by himself and at least two sureties. It was made to obtain a stay of proceedings, pending an appeal from the Special to the General Term. (Code, §§ 344 and 348.)

The deposit was made, to furnish to the defendants security for the payment of the judgment appealed from, (if it should be affirmed), and of the costs of the appeal. It continued the plaintiff's money, and its safety was at his risk.

The fact, that the defendants objected to the plaintiff's taking it out of court, after he had appealed to the Court of Appeals from the judgment of the General Term, does not alter the position of the parties. The motion to withdraw it from court, was made on the ground, that perfecting security on the latter appeal, released this fund from all claims or liens of the plaintiff. His objection to its withdrawal was, that the court had no right to deprive him of a security which the law had given him. He had a right to such security, as the actual deposit furnished. The depositing of the money, was neither an absolute nor a conditional payment of the judgment, which it was designed to secure. Its safety was not at the respondent's risk any more than that of the solvency of sureties in an undertaking would have been. If the money on being deposited, had been retained *in specie*, separated from all other moneys, and had been destroyed by fire, or stolen by a burglar, its destruction or loss, would not have been the loss of the respondent. The statute says to an appellant, instead of executing an undertaking with sureties, you may deposit money with the clerk, as security for the judgment and the costs of the appeal. But the deposit is at the risk of the depositor. If lost, without any act of the respondent contributing to produce that result, the owner and depositor of it must, in such a case as this, bear the loss. The motion must be denied.

GIBERTON v. FLEISCHEL.

An action, at issue, upon issues of fact only, and noticed for trial and placed on the calendar, if the defendant fails to appear when it is reached in its order, must be tried by the court and jury, or by the court alone, if the plaintiff elects to treat the failure of the defendant to appear as a waiver by him of the right to a trial by a jury.

If, in such a case, the plaintiff has the defendant's default entered for not appearing, and obtains an order that the damages be assessed by a sheriff's jury, the assessment of damages will be set aside.

At SPECIAL TERM, February 2, 1856. Before BOSWORTH, J.

THIS action brings at issue, and the issue brings issues of fact only. It was noticed to be tried before the court and a jury, and placed on the calendar; when it was reached in its order, the defendant did not appear. The plaintiff obtained an order, which recited the defendant's failure to appear, and directed the plaintiff's damages to be assessed by a jury before the sheriff. Such an assessment was made, and the defendant now moves that it be vacated, and the cause restored to its place on the calendar.

BOSWORTH, J.—An issue of fact, in an action for the recovery of specific personal property, "must be tried by a jury," unless a jury trial be waived, as provided in section 266, or a reference be ordered, as provided in sections 270 and 271 of the Code. (Code, section 258.) Such issues must be tried before a single Judge, (section 254.)

Notice of trial must be given ten days before the term begins, (Id. section 256.) That having been given, the party giving it may bring it to trial, when reached in its order on the calendar, (section 258.) If the notice of trial also expresses an intention to take an inquest, one may be taken at the opening of the court, on any day after the first day of the court. It must then be tried by a jury, before a Judge of the court, unless the plaintiff elects to treat the defendant's non-appearance as a waiver of the right to a trial by jury, and in such case it must be tried before the court. Probably no authority can be found for ordering a cause, in which

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issues of fact are joined, to be tried by a sheriff's jury. (2 R. S. 409, §§ 4, 5, 6, 7, 8; id. 419, § 53.)

The assessment of damages by the sheriff's jury must be vacated, and the cause restored to its place on the calendar.

FORSYTH v. EDMISTON.

A statement of the tenor and effect of the words complained of, in an action for slander, is bad pleading. The words spoken should be stated.

Whether an action for slander will lie against two, for words alleged to have been uttered in pursuance of a conspiracy between them?—*Query*.

At SPECIAL TERM, February, 1856.

DEMURRER to a complaint.

This was an action of slander, brought by William R. Forsyth against John Edmiston and James Edmiston. The complaint stated three causes of action.

The third count of the complaint alleged that the defendants, with intent to injure the credit of the plaintiff, and to impair his business, &c., did falsely and maliciously utter, in the hearing and presence of sundry merchants and other citizens, "certain false and defamatory words and statements of the following tenor and import, and to the following effect, that is to say, that his, the plaintiff's, credit was gone; that he had failed to pay his debts, and that they had obtained a judgment against him for a large amount; and that for the purpose of causing such statements to be believed, they exhibited, in connection with the conversation, copies of a record of judgment alleged in the complaint to have been fraudulently or irregularly procured by the defendants against the plaintiff; and meaning, by these words and acts, that the plaintiff was insolvent, and that the defendants had a valid judgment against him, which he could not pay. The count contained a further allegation, that all this was done by the defendants in combination with each other, they being partners and acting in concert in respect thereto.

The defendants answered as to the first two causes of action,

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and demurred as to the third:—on the ground that there was a defect of parties defendant, in that the defendants were sued jointly for an offence which could only be committed by one, and that the count did not state facts sufficient to constitute a cause of action.

John Townshend, for the demurrer.

Asa Child, opposed.

SLOSSON, J.—I think the demurrer well taken in this, that the expressions charged to have been spoken, are not alleged to have been the identical words spoken, or even as in substance *the words spoken* which, perhaps, would be good, but as words and statements of a certain tenor, import, and effect, which is bad. (*Maitland v. Joldney*, 2 East. 427; *Cook v. Cox*, 3 Maule & S. 110; *Ward v. Clarke*, 2 Johns. R. 10.)

As a general rule an action of slander will not lie against two, though an action for composing and publishing a libel may. (Chitty's Plead. 74; Bul. N. P. 5; Johns. R. 32.)

Whether, where the slander is alleged to have been uttered in pursuance of a conspiracy between the defendants, a count to that effect would be good, is unnecessary to decide, since the demurrer is sustained on the other ground; but I am inclined to the opinion that such a count would be good.

There must be judgment for the defendants on the demurrer with costs—with liberty to plaintiff to amend his count within twenty days.

BURRALL v. MOORE.

When the plaintiff gives notice of a motion for judgment, on account of the frivolousness of the answer, the defendant, if the time to amend has not expired, may amend, as a matter of course. Service of the amended answer before the time specified, in the notice for hearing the motion, will be an answer to it. Such a motion is a summary demurrer, within the meaning of the provision of the Code, which allows a pleading demurred to, to be amended as a matter of course.

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If the amendment is thought to have been made for the purposes of delay, the remedy is a motion to set aside the amended pleading.

At SPECIAL TERM, March 10th, 1856.

THE plaintiff gave notice that he would move on the 10th of March, 1856, for judgment, on account of the frivolousness of the answer.

The answer set up new matter, which was claimed to constitute a defence.

On the 8th of March, 1856, and within twenty days after the answer had been served, the defendant amended his answer, and served a copy of the amended answer. That fact was shown as being an answer to the motion.

To this it was replied, that as no demurrer had been interposed to the answer, and as it could not be replied to, but was put at issue by the Code, the defendant could not amend without leave of the court, and that the amendment attempted was unauthorized, and should be disregarded.

Burrill, Davison & Burrill, for plaintiff.

Loomis & Haynor, for defendant.

BOSWORTH, J.—The motion for judgment, on account of the frivolousness of the answer, should be regarded as, in effect, a summary demurrer, within the meaning of the provision of the Code, which allows a pleading demurred to to be amended.

A formal demurrer might have been interposed to the answer as being insufficient. In that case there could have been no doubt of the defendant's right to amend.

That right ought not, by any construction of the Code, to be made to depend upon the plaintiff's volition. It would depend on that, if he could amend, had the plaintiff formally demurred, and if it be true that he cannot amend, merely because the plaintiff chooses to test the sufficiency of the answer by a motion for judgment upon it, instead of demurring to it, and moving for judgment on the demurrer.

If a defendant amends an answer which sets up new matter as a defence, and the plaintiff thinks it is done for delay, his proper

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course is to move to set the amended pleading aside. (8 How. Pr. R. 451-466; Code, § 172.)

I think the defendant had a right to amend, and the present motion must be denied, without costs, solely on the ground that an amended answer has been regularly served since the notice was given, and therefore the answer, on which the motion was noticed to be made, does not exist as a pleading in the action.

HARSEN v. BAYAUD.

A complaint containing several causes of action, all of which belong to one of the classes named in section 167 of the Code, and affect all of the parties to the action, and do not require separate places of trial, cannot be demurred to, on the ground that such causes of action are improperly united, merely because they are not separately stated. In such a case the remedy is a motion, that the complaint be made more definite and certain, so as to show on its face, clearly and precisely, what distinct part of it is relied upon as constituting a separate cause of action.

At SPECIAL TERM, April 6, 1856.

This action comes before the court, on a demurrer to the complaint, assigning as causes of demurrer, that several causes of action are improperly united, and that they are not separately stated.

The court was of opinion, that all the causes of action belonged to one of the classes mentioned in section 167 of the Code, and did not require separate places of trial. The question most discussed was, whether they were improperly united, within the meaning of those words, as used in sub. 5 of section 144.

J. Larooque, for defendant.

J. N. Platt, for plaintiff.

BOSWORTH, J., held, that several causes of action are not improperly united, within the meaning of those words, as used in sub. 5 of section 144 of the Code, if they all belong to one of the

Blydenburgh v. Borst.

classes mentioned in section 167, and affect all the parties to the action, and do not require separate places of trial, although they may not be separately stated. The requirement of sub. 7 of section 167, that they "be separately stated," is not a fact or condition that must exist, to prevent a demurrer being taken on the mere ground that they are improperly united. That provision relates solely to the form of the complaint. If the complaint be defective in that particular, the remedy is a motion that it be made more definite and certain, so as to show what part of it is relied upon as stating facts constituting a distinct cause of action.

The words "improperly united," as used in sub. 5 of section 144, refer to the nature of the causes of action united, and not to the form of stating the facts which constitute them. They are properly united, however unartificially they may be stated, if they all belong to a specified class, and affect all the parties to the action, and do not require separate places of trial. Judgment must be ordered for the plaintiff, with liberty to the defendant to answer, in ten days, on payment of the costs of the demurrer.

BLYDENBURGH v. BORST.

When an answer sets up, among other defences, a prior action pending for the same cause, and on a reference of the latter issue by consent, the referee has reported upon it in favor of the defendant, the court will order the complaint to be dismissed without a trial of the other issues, if no valid exceptions be taken to the report of the referee.

At SPECIAL TERM, April 12, 1856.

THE answer of the defendant contained several defences, and among others, that a former action brought by the plaintiff for the same cause was still pending. The single issue raised by the latter defence, was referred to J. W. Edmonds, Esq., who reported upon it in favor of the defendant, with his opinion, that the complaint should be dismissed, with costs. A motion was made before Bosworth, J., at Special Term, for an order confirming the report and dismissing the complaint. The Judge held, that, inasmuch as all the objections made against the referee's report were untenable, the complaint must be dismissed, at last, however the

Candee v. Ogilvie.

other issues might be determined upon a trial of them, and therefore such a trial would be utterly useless. Enough having been ascertained and determined, in the due course of judicial proceedings, to entitle the defendant to a dismissal, at all events, and in any contingency, the motion must be granted, with costs. (Code, section 144, sub. 3; and sections 147 and 148.*

CANDEE v. OGILVIE.

Whether the costs of a plaintiff "for all proceedings before notice of trial," shall be \$7 or \$12, depends solely upon the nature of the action, and not at all upon the fact whether an answer is, or is not put in. (Code, section 307, sub. 1.) After the cause had been two terms on the calendar on the plaintiff's notice, he moved out of court on a five days' notice, and obtained judgment, on account of the frivolousness of the answer. *Held*, that he could not tax \$10 a term for either of those terms.

At CHAMBERS, February 15, 1856.

BOSWORTH, J., (with the concurrence of the other Justices,) held, as above stated. He held, that \$12 could be allowed under sub. 1 of section 307, in those actions only, in which an application for judgment, when a defendant fails to answer, must be made to the court. In all others, only \$7 can be allowed whether an answer or demurrer is, or is not, interposed.

That the plaintiff could have obtained a judgment without noticing the action for trial or placing it on the calendar. And having, in fact, obtained a judgment, on a motion made to a Judge out of court, under section 247 of the Code, he was not at liberty to take the ground that the cause had been necessarily placed on the calendar, whatever might have been his rights, if it had been called in its order on the calendar, on due notice of trial, and a verdict had been taken, then before the court, or a jury.

* This decision has been affirmed by the court at General Term.

HALSTED v. HALSTED.

When the judgment of divorce fixes the sum to be paid as permanent alimony, without prejudice to the right of the plaintiff, on a change of circumstances, to apply for an increased allowance, such an application will not be granted merely because her expenses have been increased, by the addition to her family of a person, whom the defendant is under no obligation to support, although his ability to pay may have been improved subsequent to the judgment.

At SPECIAL TERM, April, 1856.

THE parties were divorced in 1846, and the amount of the plaintiff's permanent alimony fixed, without prejudice to her right to move to have it increased, on a state of facts, making such increase proper.

She now petitions for an increase, on the grounds, that the defendant's circumstances have been much improved since the divorce was decreed, that her's have not been materially, and that her expenses have been increased by reason of her contributing to the support of a person named in the petition. But it does not allege, that her own means are not abundant for her own support.

BOSWORTH, J., denied the motion, on the ground, that the defendant is under no obligation, legal or moral, to support the person whose maintenance adds to the plaintiff's expenses. To increase the amount of her alimony merely on account of such expenses, would, in effect, compel the defendant to support such third person, as the plaintiff might permit to eat up her own estate.

That there may be cases in which the improvement of the pecuniary condition of such a defendant subsequent to the judgment of divorce, when considered in connection with the amount of alimony allowed by the judgment, and the social position of the parties, and their general mode of life previously, would make a further allowance just, it is not necessary to deny.

The papers on which the present motion is based do not make such a case.

KURTZ & DUNBAR v. MCGUIRE.

New matter in an answer, which, although it may constitute a good cause of action, is, palpably, no defence, either total or partial, nor a counterclaim as defined by the Code, may be struck out on motion, as an irrelevant defence.

At SPECIAL TERM, April 6, 1856. Before BOSWORTH, J.

THE complaint states a sale and delivery by the plaintiffs to the defendant of liquors, for cash, at an agreed price of \$390.20, and claims a balance due of \$208.06.

The answer denied that he had received the quantity of liquors stated, or that they were worth, or that he agreed to pay, the price named, and averred that they were worth about \$200, and no more. It then proceeds thus:—

“And this defendant further says, that on or about the 20th of October, 1856, the said plaintiffs, without the knowledge or consent of the defendant, took and appropriated to their own use eighty-seven and a half gallons of whiskey, belonging to this defendant, of the value of \$2.75 per gallon, which this defendant claims to offset against the plaintiff's claim herein, and also five gallons of gin, worth the sum of \$1.50 per gallon, and this defendant denies that he is indebted to the plaintiffs in any sum or amount, wherefore he demands that the complaint herein be dismissed, with costs.”

The plaintiff moves to strike out this part of the answer, as “irrelevant and redundant,” because it is not matter constituting a counterclaim, or a defence, either total or partial.

George O. Hulse, for plaintiffs.

Patterson & Sheehan, for defendant.

BOSWORTH, J.—An irrelevant defence, as well as an irrelevant answer may be stricken out on motion. (Code, section 152.) The fact that the plaintiffs wrongfully took and converted to their own use property of the defendant, constitutes a good cause of action.

Wandle v. Turney.

As a defence is irrelevant, because it cannot be made available in this action, it does not give a right of set-off. (2 R. S., 854, § 82, sub. 1.) It does not create a demand arising on contract.

It does not constitute a counter-claim, because it does not arise out of contract, nor out of the transaction set forth in the complaint, as the foundation of the plaintiffs' claim, nor is it connected with the subject of their action. The motion must be granted.

WANDLE v. TURNEY & COMAN.

When a vendor of real estate conveys it by a full covenant warranty deed, and a prior outstanding mortgage, unsatisfied of record, is discovered, which the holder of it declares to be valid, and that money is due upon it, and the grantor insists nothing is due or owing upon it, the grantee may bring an action to have it satisfied of record on paying what may be found due. He may make his grantor a defendant, so that a complete determination of the controversy may be had in one action. To that end, he is not only a proper but a necessary party. Such a complaint does not improperly unite several causes of action.

At SPECIAL TERM, April 26, 1856.

THIS action comes before the court on a demurrer by Turney to the complaint, assigning the grounds that several causes of action are improperly united, and that it does not state enough to constitute a cause of action as against him. The complaint shows that Wandle bought real estate of Coman, which the latter conveyed to the former by a full covenant warranty deed. The discovery of a prior mortgage recorded, which Turney owns as assignee of it, and on which he claims some \$1,400 to be due, while Coman insists that nothing is due upon it, and that the plaintiff is ignorant of the truth of the matter. He brings this action against Coman, his grantor, and Turney, the owner of the mortgage, to ascertain whether any thing, and if so, how much is due upon it, and to obtain a judgment that it be cancelled of record, on his paying the amount that may be found to be due, and a further judgment that, on his paying such amount, the grantor refund it to him. The mortgage, by its terms, has been due several years, and payment of principal or interest has not been recently de-

Spies v. Accessory Transit Co.

manded, but the holder refuses to cancel it, except upon being paid the balance which he alleges is due.

BOSWORTH, J.—There is no misjoinder of several causes of actions. They all arise out of transactions connected with the same subject of action. (Code, § 167, sub. 1.)

The only point of controversy, viz., whether any thing is due upon the mortgage, affects one defendant as much as the other, and it is proper that both should be concluded, in relation to it, by one suit; the grantor has an interest in the controversy, adverse to the plaintiff, and is a necessary party to a complete settlement of the question involved in the controversy.

The mortgage is a cloud on the plaintiff's title. If actually satisfied, it is his right to have it discharged of record. And though it may not have been fully paid, it is equally the right of the plaintiff, on paying any balance justly due, to have it cancelled of record. Any balance that may be due, if paid by the plaintiff, should be refunded by Coman.

Legal and equitable causes of action may be united, when they arise out of transactions connected with the same subject of action, and affect all the parties to the action. (Code, § 167, subs. 1 and 7.) Whether any thing, and, if so, how much, is due, affects both defendants, and one as much as the other.

Demurrer overruled, with liberty to answer in ten days, on payment of costs.

E. SPIES, by her next friend, v. THE ACCESSORY TRANSIT COMPANY.

A complaint, in an action by a married woman, which states, that a passenger carrier undertook to carry her and her baggage from California to New York; that the baggage was her separate property, and was stolen on the passage, is good in substance. If further particulars, as to the time or manner of her acquisition of the baggage, as separate property, or to show it to be such, are material, the remedy is by motion, under § 160 of the Code. The defect, if any, cannot be reached by demurrer. Her husband is not a necessary party to such an action.

At SPECIAL TERM, April 26, 1886.

Depew v. Leal.

THIS action comes before the court on a demurrer to the complaint.

The complaint states that E. Spies is a married woman; that defendant, being a common carrier, undertook to carry her and her baggage safely from San Francisco to New York; that the baggage, which was her separate property and paraphernalia, was stolen and damaged while in the custody of defendant and its agents, and claims to recover the damage consequent thereon. Defendant demurs, because, first, the plaintiff is a *feme covert*, and has no legal capacity to sue; second, that there is a defect of parties, in that her husband is not joined with her, and that a judgment in this action would not protect the defendant against an action by the husband, the contract being made in California, and not in the state of New York.

BOSWORTH, J.—The demurrer must be overruled. The husband need not be joined with the wife, when the action concerns her separate property. (Code, § 114.) Whether the plaintiff is a citizen of California or of New York, is of no consequence, so far as concerns the remedies and the forms of proceedings, when she prosecutes in the courts of this state. The demurrer admits the truth of the allegation, that the baggage was her separate property, and the court does not know that a California wife may not have a separate estate. The legal presumption is, that she may.

If the defendant has a right to be informed, by the complaint, of the particular facts which constitute the baggage her separate property, his remedy is by motion under § 160 of the Code. A demurrer will not reach such a defect, as the complaint is good in substance.

The defendant may answer, on paying the costs of the demurrer.

DEPEW v. LEAL.

After a dissolution of a partnership, and an action brought by the partner entrusted with the settling of the business, against his copartner for an account, the court will not order a general bill of the particulars of the plaintiff's claim to be furnished.

When the complaint states claims not evidenced by the books of the firm, and par-

Depew v. Leal.

ticulars of such claims are sought, the application should be special, and directed to the specific transactions of which particulars are sought, and the moving affidavits should state the grounds creating the necessity, or establishing the propriety, of granting the application.

At SPECIAL TERM, May 5, 1856.

THE defendant moves for a bill of the particulars of the plaintiff's demands. The parties were partners, and dissolved, agreeing that Depew should close the business of the firm. He brings this action against Leal, to obtain an accounting, and a judgment, that either should pay to the other any sum, in which he might be found indebted. An order had been made on defendant's motion, that the plaintiff deposit all books and papers relating to the business, so that the defendant might inspect and take copies of them. The defendant now moves, under § 158 of the Code, that a "bill of particulars of the claim of the plaintiff," in this action, be furnished by him.

A. R. Dyett, for plaintiff.

Wm. H. Taggard, for defendant.

BOSWORTH, J.—Section 158 of the Code does not apply to such a state of facts. Unless such a plaintiff makes a claim for moneys contributed to, or paid for his firm, not evidenced by, or intelligible from the entries upon the books of the firm, one partner has presumptively as much knowledge of details as the other.

To furnish a bill of particulars, is to furnish a copy of the books. When the pleadings show that claims are made, the nature or extent of which is not shown by the books of the firm, if particulars are sought, the application should be special, and directed to particular transactions, and the moving affidavits should state specially the grounds, creating the necessity, or showing the propriety of granting it.

Motion denied, with \$7 costs to plaintiff, to abide the event.

ORMSBY v. DOUGLAS.

When the answer to a complaint, in an action of slander, denies each and every allegation of the complaint, and also justifies, by alleging that the plaintiff was guilty of the misconduct which the words impute, the court will not, on motion, direct one of the defences to be stricken out, nor coerce the defendant to elect between them, and rely on one alone. Especially, this will not be done, when the defendant swears that the answer is true, for it may be true, that he did not speak the words charged, and that the plaintiff committed the offence they impute. His right to justify does not depend upon his admitting the speaking of words which he never did speak. The right is absolute to set up as many defences as he may have.

At SPECIAL TERM, May 5, 1856.

THE plaintiff moves that the defendant elect, between certain defences set up in his answer, by which he will abide, and that the others be stricken out, or in default of such election, that certain defences referred to, in the notice of motion, be stricken out. The complaint states the speaking of slanderous words. The answer denies each and every allegation of the complaint, and also sets up as a defence, that the plaintiff was guilty of the misconduct which the words impute. The motion is made on the theory, that a denial of the speaking of the words, and an allegation that the plaintiff is guilty of the misconduct they impute, are inconsistent with each other, and that the defendant should be coerced to rely on one of these defences alone. The defendant makes affidavit that the whole answer is true.

Pike & Galpin, for plaintiff.

Fullerton & Dunning, for defendant.

BOSWORTH, J.—When the answer to a complaint, in an action of slander, denies each and every allegation of the complaint, and then sets up a justification, the court will not compel a defendant to elect one of the defences, and abide by it, and strike out the other. They are not necessarily inconsistent; both may be true.

Powell v. Finch.

The court will not, on motion, decide that both are not true, when they may be, and the defendant swears that they are. A defendant has an absolute right to set up as many defences as he has, and if he fails, by the death, absence or imperfect memory of his witness, to prove one, it is no reason why he should not be permitted to have the benefit of the other.

It may be true, that a defendant never spoke the words charged, and yet it may be true that a plaintiff has committed the offence they impute, and that the defendant can prove it. It may not be true, that the defendant spoke the words charged, and yet the misunderstanding, misrecollection, or erroneous impression of those who heard him, may result in testimony establishing, *prima facie*, that he did. He may justify, if he had spoken them; and if contrary to defendant's conviction of the truth, it shall be proved he did speak them, when he did not speak them, the defendant should be allowed to justify. In order to justify, he should not be compelled to expressly admit that he spoke words which he can conscientiously swear he never did speak. The only question submitted being, whether an answer, in such an action, which denies all the allegations of the complaint, can also be permitted to contain the defence of justification, and being of the opinion that it can, the motion is denied, but without costs to either party.

POWELL v. FINCH, and others:

In an action against several, for the specific performance of their joint contract, to purchase real estate of the plaintiff, and secure a part of the price by their bond and mortgage, payable at a future day, all of them must be served with the summons, or appeal in the action, to enable the court to render a judgment which will be a complete determination of the controversy.

If brought to trial, upon the answers of a part of the defendants only, when the others have not been served with process, or appeared in the action, the court will not permit the trial to proceed.

At GENERAL TERM, May, 1856. Before BOSWORTH, J.

THIS action was called in its order on the calendar, and the plaintiff and the defendants who had appeared in the action, submitted their proofs. The action is brought by the plaintiff, against

three defendants, to compel the specific performance of their joint contract, to purchase land of the plaintiff, and pay a part of the price on the day fixed for the delivery of the deed, and secure the balance by their bond, and by their mortgage of the premises in question, payable at a future day. That day had not arrived, at the time of the trial. On its being discovered that only two of the defendants had appeared in the action, and that the third had neither appeared, nor been served with process, the Judge suggested his doubts, whether the action was in a condition to be tried, and to admit of a judgment in favor of the plaintiff, which could be enforced. Opportunity was given to the counsel of either party to refer the court to authorities on the subject.

E. S. Vanwinkle and H. S. Cowdrey, for plaintiff.

D. E. Wheeler, for defendants.

BOSWORTH, J., on a subsequent day, held, that the action is not in a condition to be tried. The defendant, who has not appeared, or been served, is not before the court.

A judgment that he execute such a bond and mortgage as the contract calls for cannot, rightfully, be rendered, nor enforced, as against him, if rendered.

A complete determination of the controversy cannot be had, without the presence of the third defendant. Service of a summons upon him, or his appearance in the action is indispensable. (Code, § 122.)

The trial which has been had must be treated as a nullity. The defendant, who has not been, must be served with process. When the action is in a condition, as against all the defendants, to be tried, it must be regularly noticed for trial, and be tried, as if no attempt to try it had been made.

PLATT & PLATT v. TOWNSEND.

An order for a bill of particulars, and a stay of proceedings until the bill is furnished, no longer operate, *per se*, to enlarge the time to plead. The only way in which such an extension can be procured, is by an order expressly granting it, founded on proper affidavits.

Before all the Judges, May, 1856.

THIS action comes before the court, on an appeal from an order, vacating a judgment in favor of the plaintiff, for irregularity.

The complaint was upon a note for \$2,500, made by defendant, and also stated that he owed the plaintiffs \$19,659.95, on account; that he paid them \$21,000; that they applied enough of this on the account to satisfy it, and the residue on the note, leaving due, on the note, \$1,216.65, for which they prayed judgment. The time to answer expired the 26th of December, 1855. On the 19th of December, the defendant, upon an affidavit, not professing to state a defence on the merits, obtained an order that plaintiffs deliver a "bill of particulars" of the account mentioned in the complaint, and that, in the mean time, all proceedings on their part be stayed. On the 27th the bill of particulars was served, and on the next day the plaintiffs entered a judgment for want of an answer. On motion, an order was made, vacating the judgment for irregularity, on the ground that the order operated to extend the time to answer. From that order the plaintiffs appealed to the General Term.

Benj. V. Abbott, for appellants.

S. Sanxay, for respondents.

BY THE COURT. SLOSSON, J.—The ground upon which the order vacating the judgment in this case is appealed from is, that an order for a bill of particulars with stay of proceedings, no longer operates of itself to enlarge the time to plead, inasmuch as the time is now determined by statute, and can only be enlarged

by an order of the court applied for on an affidavit of merits, pursuant to the rules and practice of the court.

The Code expressly provides, (§ 148,) that the answer must be served within twenty days after the service of the complaint. The only power which the court has to enlarge this time is that given by section 405 of the Code, which provides that the time within which any proceeding in an action may be had, except on appeal, may be enlarged, upon an affidavit showing grounds therefor, by a Judge of the court, &c. Rule 20 of the Supreme Court, rules (adopted 1854) by which also the practice of the court is regulated, provides that no order, extending the time to answer or demur to a complaint, shall be granted, unless the party applying for it shall present an affidavit of merits as therein prescribed.

We have considered the matter, and all the justices of the court, including the one granting the order appealed from, are of opinion that an order for a bill of particulars, though accompanied by a stay of the adverse party's proceedings, does not, since the Code, operate to enlarge the time to answer; but that the only way in which an extension of time can be procured, is by an express order to that effect, founded upon an affidavit of merits, as provided by the rule.

Where the defendant procures an order for a bill of particulars, a clause, extending his time to answer, should, if he deems such extension necessary, be inserted in the order for the bill. If the bar understand this, it can work no hardship. But the other construction, if sustained, might very often lead to unjust delay, as the defendant, by procuring an order for particulars with a stay of proceedings, which is granted almost as a matter of course, might, though he had no merits, delay the plaintiff; and often, by delay, in effect defeat the satisfaction of his claim.

The order appealed from is reversed. The defendant may apply to the court for leave to answer on the merits, and, meantime, the plaintiff's proceedings should be stayed.

 Price v. McClave.

PRICE v. MCCLAVE.

A complaint upon a promissory note against maker and endorser, is not sufficient, under section 162 of the Code, if it fails to aver that the maker made the note, and that the endorser endorsed it, although the complaint contains a copy of the note and of its endorsements.* An averment that a note was protested, is not equivalent to an averment that it was duly presented for payment to the maker, and payment was refused. (3d Abbott, 252.)

At SPECIAL TERM, May, 1856.

THIS action came before the court on a demurrer to the complaint.

G. Carpenter, for plaintiff.

Mr. Mitchell, for defendants.

DUER, J., held the proposition first above stated, on the author-

* In *Prindle v. Caruthers*, decided by the Court of Appeals, in June, 1857, "the complaint averred that the defendant made 'his contract in writing, (giving a copy,) by which, for value received, he promised to pay H. C. or his wife, annually, on the first day of April, during the life of the longest liver of them, the sum of two hundred dollars, if called for, or needed;' that such contract is, and was, prior to April 1, 1854, the property of plaintiff by purchase; that H. C. died March 30, 1854; that H. C.'s wife is living; that after the 1st of April, 1854, plaintiff demanded the two hundred dollars payable on that day; that defendant has not paid, and is justly indebted in that sum, with interest. Held, on demurrer, that the complaint is sufficient. The remedy for such formal defects as in this case, to expressly aver a consideration for the contract, and to state from whom the plaintiff purchased, is by motion under section 160 of the Code, to make the pleading more definite and certain.

"If the complaint should be held insufficient, as a common law pleading, on the ground that the plaintiff does not make title to the contract, it is sufficient, under section 162 of the Code. Reversing unanimously." (S. C. 10 Howard, Pr. R. 33.)

The foregoing note of the decision made by the Court of Appeals, is taken from *The Evening Post*, for which an abstract of its decisions in June, 1857, was prepared by the reporter of that court. If *Prindle v. Caruthers*, as reported in 10 How. Pr. R. 33, was unanimously reversed, and on the grounds above stated, then it may well be doubted, whether the complaints in *Lord v. Chestbrough*, (4 Sand. S. C. R. 696,) and *Alder v. Bloomingdale*, (1 Duer, 601,) should not have been held to be good on general demurrer.

Hamilton Building Association v. Reynolds.

ity of *Lord v. Chesebrough*, (4 Sand. 696,) and *Alder v. Bloomington*, (1 Duer, 601,) and also referred to *Bank of Geneva*, (8 How. Pr. R. 51.)

He held the second proposition on the ground, that although notice of protest is valid as a notice of dishonor, it by no means follows that an averment of protest is a sufficient allegation of a due presentment of the note to the maker and of his refusal to pay it, in a complaint, in which all the facts constituting the cause of action are required to be stated. The fact of a protest, however irregularly or improperly made, would prove an averment of mere actual protest.

On appeal to the General Term, the order sustaining the demurrer was affirmed.

THE HAMILTON BUILDING ASSOCIATION v. JOHN M. REYNOLDS.

When a complaint, filed by a mortgagor, to set aside a mortgage, has been dismissed upon pleadings and proof, he is estopped from disputing its validity in a suit against him for its foreclosure.

A mortgage to a building association in the usual form, is a valid security only for the monthly payments stipulated to be made, not for fines and other dues.

At SPECIAL TERM, June, 1854. Before DUER, J.

ON foreclosure of mortgage—the cause was heard upon pleadings and proofs—and the case, on the part of the plaintiff, as stated in the complaint, being proved, it was insisted, on the part of the defendant, that the provisions in the mortgage designed to secure monthly payments and fines, and the disposition of any surplus from the sale of the mortgaged premises were illegal and void, and that he was entitled to be relieved, and to have the mortgage cancelled, upon the repayment, with interest, of the sum originally advanced to him by the company.

To repel this defence, the plaintiff gave in evidence the record of a judgment in the Supreme Court, dismissing the complaint of the defendant in a suit instituted by him against the association for the purpose of obtaining exactly the same relief that he now claimed, and it appeared from the record, that the judgment was rendered

Hobart v. Frost.

upon the ground, that upon the pleadings and proofs, the plaintiff, (the present defendant,) was not entitled to the relief he demanded.

Held, that this judgment, as it was rendered in a suit between the same parties, and involving the precise question now at issue, was conclusive between the parties, and created an estoppel from which it was beyond the power of the court to release the defendant. That the mortgage must, therefore, be adjudged to be valid, but that, in the opinion of the court, it was a valid security only for the stipulated monthly payments, and not for fines or other dues. Judgment would therefore be given only for the amount of those payments proved to be in arrears.

Judgment for plaintiffs accordingly.

HOBART, receiver, v. H. R. & W. I. FROST.

A judgment-debtor who appears pursuant to an order for his examination, which, by its terms, is returnable before "one of the Justices of the court," instead of "the Judge" who made it, and without objection to the form of the order, submits to an examination, and omits to appeal from a subsequent order appointing a receiver, waives all objection to the jurisdiction of the Judge to take the examination and make the appointment. In an action by such receiver against such debtor and his assignee, to set aside an assignment by the debtor to the latter as fraudulent, under a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, the defendant cannot avail himself of the objection that the appointment of the plaintiff appears by the complaint to be invalid.

That objection can only be raised upon a demurrer specifying as its ground, that the plaintiff has not legal capacity to sue.

At Special Term, June 4, 1856.

THE action was brought by the plaintiff, a receiver appointed in a supplementary proceeding to set aside an assignment made by the debtor, as made with an intent to defraud creditors. The defendants were the judgment-debtor and the assignee. The demurrer specified as its only ground, that the complaint did not state facts sufficient to constitute a cause of action, and the argument in its support was, that it appeared on the face of the complaint, that the Judge making the order for the appointment of

the receiver, had no jurisdiction, inasmuch as the original order for the appearance of the debtor, which was set forth in the complaint, was returnable before one of the Justices of the court, and not before the Judge making the order.

DUER, J., held, that the demurrer must be overruled; that the objection to the jurisdiction of the Judge, by whom the debtor was examined, and the order appointing a receiver made, ought to have been taken when the debtor appeared before him; that it was an objection which it was competent to the debtor to waive, and that, by his submitting to be examined and not appealing from the order appointing the receiver, it was effectually waived; that, if the original order for his appearance was a nullity, he was not bound to appear, nor, when he appeared, to be examined; that his appearance and submission to an examination must, therefore, be regarded as voluntary acts, and that a valid order for the appointment of a receiver might be founded upon a voluntary appearance and examination of a judgment-debtor, could not reasonably be doubted; that it is only when a Judge or court has no jurisdiction of the subject-matter of the proceeding or action in which an order is made or judgment rendered, that the order or judgment is wholly void. It is to such cases only, that the maxim applies, that consent cannot give jurisdiction. In all other cases, the objection to the exercise of jurisdiction may be waived, and it is waived whenever it is not urged in proper season—that is, when the exercise of the jurisdiction is first claimed. (Carthew, 124; Cro. Eliz. 562; 1 Strange, 177; 3 Sand. S. C. Rep. 605.) Here the general authority of the Judge to make the order appointing a receiver—in other words, his jurisdiction over the subject-matter of the order—was unquestionable.

Held, further, that if the objection to the jurisdiction were valid in itself, it would not be taken under a demurrer, specifying, as its only ground, that the complaint “did not state facts sufficient to constitute a cause of action.” The ground that ought to have been specified to enable the court to listen to the objection was, that the plaintiff had not “legal capacity to sue.” (Code, section 144, sub. 2.) The facts set forth in the complaint were plainly sufficient to constitute a cause of action; for if true, the assignment impeached was certainly void; nor had this been denied.

McGinity v. Mayor of New York.

The objection was, not that the action was not maintainable at all, but that the plaintiff had not a personal right to maintain it.

NOTE.—If it appeared by the complaint, that the order appointing the receiver was absolutely void, and not merely erroneous, might not the objection be taken under a demurrer, specifying, as its ground, that the complaint did not state facts sufficient to constitute a cause of action? Might it not be said of such a complaint, that it did not show a cause of action in favor of the plaintiff, but the reverse?

Is not the objection, that "the plaintiff has not legal capacity to sue," applicable to a complaint, which may show a cause of action in his favor, while it also shows the plaintiff to be under some disability, as non-age, or otherwise, which incapacitates him from suing in his own name? (1 Whittaker's Pr., 460.)—*J. & B.*

McGINITY v. THE MAYOR OF NEW YORK, &c.

In an action against a city municipal incorporation, to recover damages, sustained in consequence of a grating over an area in a sidewalk being in a defective or unsafe condition, it is not enough to entitle the plaintiff to recover, to prove that the covering was insecurely fastened at the time of the accident, and that by reason thereof, and without fault on his part, he was injured. Notice to the defendant of the defect, or negligence of duty, in not ascertaining, and remedying it, must be shown.

At SPECIAL TERM, June 4, 1856.

THE action was brought to recover damages for personal injuries sustained by the plaintiff, in consequence of the neglect of the defendants, in not keeping a sidewalk in Prince street in proper repair. It appeared, upon the trial, that in December, 1854, the plaintiff was walking, in the evening, on a sidewalk in Prince street, and, in consequence of a grating, covering a vault, on which he had stepped, giving way or turning over, fell through, and was seriously injured. Upon examination, it was found that a chain which had secured the grate was broken, but from what cause, or how long before the accident, did not appear. The jury gave a verdict for the plaintiff for \$1,000 damages.

DUER, J., held, that the plaintiff was bound to show affirmatively, that there had been a neglect of duty by the corporation, and that this was not shown merely by proving that the grate was insufficiently fastened at the time of the accident. There was no

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reason to believe, from the evidence, that the grate was improperly constructed, or that the defendants had any notice, or were chargeable with knowledge of its defective state. The chain might have been broken by an act of violence, which, for ought that appeared, may have been committed only a short time before the plaintiff was injured. The verdict, therefore, was not sustained by the proof that the plaintiff was bound to give, and must be set aside.

New trial granted, upon payment of costs.

SECOND AMERICAN BUILDING ASSOCIATION v. PLATT, and
others.

A provision, in a mortgage given by defendant to the plaintiff, to secure certain monthly payments to be made by him, as a member of the association, to the effect that, if default should be made "in the said monthly payments for the space of six months after they, or any of them, should become due," it should be lawful for the association to advertise and sell the mortgaged premises at public auction, according to the statute, is equally a bar to an action brought within the six months to foreclose the mortgage, as to a proceeding under the statute.

At SPECIAL TERM, June 4, 1856.

THIS action comes before the court, on a demurrer to the complaint, in an action to foreclose a mortgage.

The mortgage was given to secure certain monthly payments stipulated to be made by the defendant, as a member of the association, and it contained a provision that if default should be made "in the said monthly payments, for the space of six months after they, or any of them, should become due," it should be lawful for the association to advertise and sell the mortgaged premises at public auction, according to the statute. The complaint averred that default had been made in monthly and other payments, and that there was due from the defendant the sum of \$244.19, but did not aver that any one monthly payment had been due six months. The defendant demurred, on the ground that it did not appear on the face of the complaint, that the plaintiff had any right of action.

DUER, J., held, that the provision in the mortgage was not to be limited to an exercise of the power of sale by advertising, ac-

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according to statute, but by its reasonable interpretation, operated as an extension of the term of credit, so as to preclude the association from commencing any action upon the mortgage until the expiration of six months from the time any monthly payment, remaining unpaid, had become due; and hence, that the complaint, as it did not allege nor show that there had been a default in any one monthly payment for that period, was fatally defective.

Demurrer allowed, with liberty to plaintiff to amend complaint within twenty days; costs to the defendant, to abide event.

MECHANICS' BUILDING ASSOCIATION v. STEVENS, et al.

In an action by a building association, against one of its members, to recover monthly dues, in arrear, it is no defence that the association is a "moneyed incorporation," within the provisions of the Revised Statutes, and that its charter, as such, had become void before the commencement of the action, from its failure to comply with the provisions of §§ 29, 30 and 31, of the statute. (1 R. S. 535.)

At SPECIAL TERM, June 4, 1856.

THIS action came before the court, on the trial thereof, having been brought to foreclose a mortgage.

The mortgage, in this case, was given to secure the payment of the monthly dues of a member of the association. The cause was heard on the pleadings and proofs, and it was proved that the association was duly incorporated under the general act for the incorporation of building and other associations, passed April 10, 1851, and that default had been made in the payment of the sums set forth in the complaint. The only defence relied on was, that the association was a "moneyed incorporation," within the provisions of the Revised Statutes, and that its charter, as such, before the commencement of the suit, had become void, from its failure to comply with the provisions contained in §§ 29, 30 and 31, of the statute. (1 R. S. 535.)

DUER, J., held, that this is not a defence of which the defendants can avail themselves; that, admitting that the association was a moneyed corporation, subject, as such, to the provisions of the

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Revised Statutes, and that, by its failure to comply with those provisions, it had forfeited its charter, it belonged to the state alone, by a proceeding instituted for that purpose, to enforce the forfeiture, and that the association, until by a judicial sentence its charter was declared to be void, was a corporation *de facto*, and that no private person, more especially no person dealing with it, could be permitted to say that it was not also a corporation *de jure*. (*Triton Ins. Co. v. McGarian*, 4 Denio, 392; *Brower v. Appleby*, 1 Sand. S. C. R. 107; *Palmer v. Lawrence*, 3 id. 161, 170.)

Judgment for plaintiff, directing sale of mortgage and premises.

COSTER v. N. Y. & ERIE R. R. Co. and D. DREW.

Four persons, joint owners of a vessel, leased her, and two of them afterwards brought suit for the hire.

Held, 1st. That a legal action could only be sustained by all four suing together.

2d. That fewer than all might proceed upon equitable rights, and enforce them in equity.

3d. That to entitle themselves to do so, they must show in their complaint facts which excused them from joining the other co-owners as plaintiffs, and in such case must join them as defendants, unless it be shown that they had ceased to have any interest in the matters in controversy.

The complaint averred that the defendants had, some months after the lease was given, with intent to defraud the plaintiffs, purchased from the other parties interested, their shares in the vessel.

Held, 1st. That the suggestion of fraud was immaterial, since, as respected the plaintiffs, the defendants had a right to purchase those shares.

2d. That the averment, of the sale of those shares, did not present any reason or excuse for not making the former owners of them parties, although it was a reason for proceeding in equity; it not appearing that they had transferred their interest in the hire which accrued prior to the sale of their shares in the vessel itself.

A cause of action, to restrain some of the part owners of a vessel from disposing of her, in derogation of the rights of other part owners, being the plaintiffs, cannot be joined with a cause of action for the hire of the vessel.

THIS court, at General Term, in July, 1856, held, as above stated, on appeal from a judgment in favor of the defendants, upon demurrers interposed by them to the complaint.

WOODRUFF, J., announced the judgment, and his opinion, in which all the Justices concurred, is reported, with the pleadings and proceedings, in 3 Abb. 322.

PEABODY, et al. v. BLOOMER, et al.

In an action against several for a debt due by them as partners, one of them set up as a counter-claim, a claim for damages sustained by him, by alleged misconduct of the plaintiffs, in the management of his affairs under an agency formerly held by them from him.

Held, that this counter-claim was bad, because—

1. If the demand were regarded as based on contract it was a fatal defect, that there was no mutuality between the two contracts, and such demand was due to Bloomer alone.
2. If it were deemed to be based upon tort, then it was not connected with the subject of the plaintiffs' action.

Before all the Justices, July, 1856.

THIS action came before the court, on an appeal by defendant Bloomer, from an order made by Mr. Justice Hoffman, sustaining a demurrer by the plaintiffs to so much of the answer to the complaint as set up, as a counter-claim, a demand of Bloomer alone against the plaintiffs. The reasons of Justice Hoffman, assigned in support of his decision, are reported in 3d Abb. 355. The character of the pleadings is sufficiently disclosed, in the opinion of Woodruff, J., who announced the judgment of the court, on the appeal.

J. Moody, for appellant.

H. G. De Forest, for respondents.

BY THE COURT. WOODRUFF, J.—This action is brought to recover money alleged to be due to the plaintiffs, in their own right, and as assignee of their co-partner, Flint, from the defendants as joint debtors, for money lent and advanced to the defendants, and paid, laid out, and expended for their use, as co-partners.

The defendant Bloomer, answering separately, among other defences, sets up a set-off, or counter-claim, in his own favor, individually, for damages sustained by himself by reason of the

plaintiffs' and the said Flint's fraud and negligence, in this, that he appointed the plaintiffs and the said Flint his agents, under a power of attorney, to manage and to attend to his interests in California, which power of attorney, he avers, the plaintiffs and the said Flint received, and undertook to perform, keep and execute the trust, duties and obligations thereby given, conferred and imposed. By the fraudulent violation of their duty, in this respect, the defendant avers that he has sustained damages, which he insists upon as a set-off, or counter-claim, in this action.

We fully agree with the conclusion at which Mr. Justice Hoffman arrived, in the examination of the demurrer to this defence, at the special term, that, to an action against several joint debtors, for a debt due by them as copartners, one of them cannot avail himself, either by way of set-off or counter-claim, of such a defence. If the defence have any foundation, as very imperfectly, we think, exhibited in the answer, it belongs to Bloomer alone. If it can be regarded, under the averments in the answer, as arising upon contract, then it is a fatal defect that there is no mutuality between the two claims which are exhibited. If it be deemed a tort, as set up in the answer, then it is not so connected with the subject of the action that it constitutes any ground of recoupment; and in no respect is the defence such that in this action there can be a separate judgment against the defendants, who are jointly liable, and who do not and could not set up the defence upon which the defendant Bloomer relies. The case of *Parsons v. Nash*, (8 How. Pr. R. 454,) instead of sustaining such a counter-claim, appears to tend to the contrary.

Where one of the joint debtors pays the debt, that is payment for all, and any or all of them may set up the payment in bar. Here there is no pretence that either of the other defendants could have set up the defence in question. But, without pursuing the subject, it must suffice to say, that the elaborate opinion pronounced at Special Term, by Mr. Justice Hoffman, appears to us to be entirely sound in its conclusion, and it is unnecessary to enlarge upon the subject here.

The judgment appealed from must be affirmed, with costs.

LIVINGSTON v. ROBERTS.

Notice of a motion, under the last sentence of section 282 of the Code, need not be given to the appellant's sureties; it is enough that it is given to the owner of the judgment appealed from.

At SPECIAL TERM, September 26, 1856.

THE plaintiff having obtained a judgment, the defendant appealed to the General Term, and gave an undertaking which operates as a stay of proceedings. He now moves, under section 282 of the Code, for an order, that the clerk enter on the docket of the judgment, that it is "secured on appeal." Notice of the motion has been given to the owner of the judgment. The plaintiff objects that no notice has been given to the sureties in the undertaking.

BOSWORTH, J.—The Code does not require notice to the sureties, but only to the owner of the judgment. It is true the Code declares the court may make this order on such terms as it shall see fit. These terms, it was doubtless supposed, would be such as would be for the benefit of the owner of the judgment. Sureties may fail or become embarrassed before such a motion is made. When that is found to be the case, the court would not grant the order without further security was given. The legislature has not seen fit to require notice to be given to the sureties. As the owner of the judgment suggests no reason why the motion should not be granted, except that no notice has been given to the sureties, the motion is granted.

FAKE v. EDGERTON & BRITTON.

Executions, to be valid, need not state the time or place of their return.

One against the body may issue short of sixty days, after the return of one against property. The former need not recite facts showing the right to arrest a defendant.

It is enough that he was held to bail by a valid order which continues in force.

At SPECIAL TERM, September 26, 1856.

DEFENDANT Edgerton moves to set aside an execution against his person, on which he has been arrested. The defendants were held to bail by an order still in force. Judgment was perfected on the 3d, and a transcript filed July 7th, 1856. An execution against defendant's property was issued to the sheriff of New York city and county that day, and returned unsatisfied August 5th.

The *ca. sa.* was issued September 3d, and is endorsed with directions to arrest Edgerton only. He now moves to set it aside, because, 1st. No place or time, where or when it is to be returned, is mentioned in it. 2d. Sixty days had not elapsed between the issuing of the two executions. 3d. That defendant being a resident of Kings, an execution against his body was irregular, until one against his property had been issued to that county, and returned. 4th. It does not appear on the face of the *ca. sa.* that it was issued by order of the court, or that the action was one in which the defendant could be arrested. 5th. Directions were endorsed to arrest only one defendant, while the judgment is against two, as joint contractors.

H. Buckman, for plaintiff.

D. McMahon, for defendant.

BOSWORTH, J., held, that section 289, which prescribes the form of the execution, does not require a return day to be named in it. The sheriff is required by section 290 to return it within

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sixty days after he receives it. The duty which that section imposes, need not be stated in the body of the execution.

It is not necessary that sixty days should intervene between the issuing of the two executions. It is enough that the first has been actually returned by the sheriff, when he has acted *bond fide*. (§ 288.)

To charge bail, it was necessary before the Code, to issue a *fi. fa.* to the county in which the defendant was arrested. That was done in this case. The Code has not required one to be issued to the county where the defendant resides.

The *ex. sa.*, on its face, states all which section 289 requires. It is enough to justify the execution, that an order was made holding the defendant to bail, which is still in force. (2d Seld. 560.) Whether that order may properly form part of the record it is unnecessary to decide.

It is not easy to perceive why one defendant, liable to be arrested, should complain that another, by instructions from the plaintiff, though equally liable, has not been. The execution is regular in form, and such instructions do not authorize the release of a party rightfully arrested under it. Motion denied, with five dollars costs.

WEBSTER v. STEVENS.

On appeal, the respondent may except to the sureties in the undertaking, within ten days after it is filed, though more than ten days have elapsed after a copy of it, and the notice of appeal, were served.

At SPECIAL TERM, September 26, 1856.

THE plaintiff served on the 18th of August, on the defendant, a notice of appeal to the Court of Appeals, and a copy of the undertaking executed to effect a stay of proceedings. The undertaking was not filed until the 13th of September, and on the 16th defendant excepted to the sureties in the undertaking. Plaintiff now moves that the notice of exception "be vacated and set aside," or that the term of justifying be extended.

M. K. Burke, for plaintiff.

Henry Day, for defendant.

BOSWORTH, J.—To render an appeal effectual for any purpose, the appellant must execute an undertaking (Code, § 834) to pay costs; and to effect a stay it must provide for paying the judgment, (§ 835.) The undertaking is of no effect unless a copy of it and of the affidavits of the sureties be served, (§§ 840, 841.) It must be filed with the clerk, with whom the judgment is entered, (§ 848.) The Code does not in terms say it must be filed, before the undertaking can be of any effect. It is quite clear that until it is filed, the respondent has no security that one exists which can be made available to him. It may be destroyed, and he be unable to prove that it ever existed. I think it a fair construction to hold, that to make a certain and perfect delivery of it to the use of the respondent, it should be filed. Prior to the Code, a plaintiff in error was required to file the bond at the time of serving the writ on the clerk. (2 R. S., 597, § 82.) In the Court of Chancery, the appellant was required to file his bond and notice of appeal within the time allowed to appeal. (1 Barb. Ch. Pr., 401 and 409.)

Under the Code, no approval of the bond, not even an *ex parte* one is required, unless exception is taken to the sureties. There is no hardship in requiring an appellant to file his undertaking with his notice of appeal. The defendant cannot be certain that there is an undertaking to which he can resort until it is filed. I think his exception was taken in time. But an order may be entered, extending the time to justify, ten days.

FORD, respondent, v. TURNER, TOWNSEND & JOHNSON, appellants.

A decision at Special Term, overruling a demurrer to a complaint, and giving leave to answer, is an order, and not a judgment, while the privilege given to answer is continuing.

A decision of the General Term, which merely affirms such order, is, itself, an order, when the complaint is one on which the court must subsequently decide at Special Term what is the nature and extent of the relief to be granted.

An appeal from such a General Term decision, accompanied with the undertaking prescribed by section 334 of the Code, does not stay proceedings on the part of the plaintiff. An application for a stay, in such a case, and under such circumstances should be denied.

(Before all the Justices, except HOFFMAN, J.)

THIS action came before the court, on an appeal by three of the defendants from an order denying an application on their part for a stay of plaintiff's proceedings pending an appeal, which has been taken by them from a decision of the General Term, to the Court of Appeals. The following is a brief history of the proceedings:—Ford originally made David and Turner defendants. They answered. Their answer disclosed a state of facts existing when this action was commenced, rendering it proper, in the plaintiff's view of his rights, to have Townsend and Johnson made parties, and entitling him to relief against them. An order was granted, authorizing the plaintiff to make them parties to a supplemental complaint. That was done. They severally demurred to the original and supplemental complaint. Turner also demurred to the latter, and David omitted to answer it. The demurrers stated various grounds, and among others, that there was a misjoinder of causes of actions, and of parties, and that no cause of action against either was shown by the complaint. The complaint sought equitable relief, viz., a judgment, that David should pay plaintiff a certain sum; that it should be declared a lien on certain property mentioned in the complaint, and that Turner, Townsend and Johnson, who had been severally and successively owners of such property, should be declared liable for the same sum, and directed to pay it, on default of collecting it of David, or out of the proceeds of such property.

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The demurrers were overruled at Special Term, in March, 1855, with liberty to answer, on terms, in twenty days. That order or decision was affirmed on appeal, by the General Term, in October, 1855. The time to answer having expired, the action was noticed for trial at the June Special Term, 1856, on the issues of fact, and notice was given to the demurrants, that, at the same time, application as against them would be made for the relief demanded by the complaint. The action was then tried; the demurrants appeared, and were heard, and various exceptions were taken by them to the proceedings then had. At Special Term it was decided that the plaintiff was entitled, substantially, to the relief demanded by his complaint. The demurrants appealed to the Court of Appeals from the decision of the General Term, which affirmed the order overruling the demurrers, and gave the statutory security for costs only. They obtained an order staying proceedings and granting time to make a case to renew the proceedings had at Special Term on the trial of the action. A case was made and served, and amendments were proposed by plaintiff. Before the hearing could be had on such case, the plaintiff threatened to docket the judgment which had been entered on the final hearing at Special Term, and issue execution. The demurrants then moved, at Special Term, before Mr. Justice Slosson, for an order staying all proceedings on the part of the plaintiff, until the decision by the Court of Appeals of the appeal from the decision of the General Term. That motion was denied, and an order to that effect entered. From that order the demurrants appealed, and on the latter appeal this action now comes before the General Term.

S. Sanxay, for appellants.

W. W. Northrup, for respondent.

BY THE COURT. BOSWORTH, J.—If the defendants have appealed to the Court of Appeals, from a decision from which an appeal can be taken to that court, and given security which the statute declares shall operate as a stay, no order of this court is necessary to prevent the plaintiff from proceeding further, pending that appeal. It would, perhaps, be a sufficient ground on

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which to dispose of this appeal, that it was premature to invoke the action of the court, to prevent a proceeding from being taken in the progress of the action, which if taken, and irregular, the court would set aside. It is not usual to obtain an order prohibiting a party from taking an irregular proceeding.

But we think the order appealed from was right on another ground. The decision of the General Term, from which an appeal has been taken to the Court of Appeals, is an order, and not a judgment. No appeal to that court can be had from such an order. It is not a final order, from which an appeal lies to that court.

The Court of Appeals will, of course, determine that question for itself, when a motion shall be made to dismiss the appeal, or when the argument of that appeal shall be moved. But as this court is asked to stay proceedings, on the ground that an appeal has been properly taken, and the requisite security to effect a stay given, it must judge for itself, in disposing of the motion, whether a case is made which justifies it in interfering.

The defendants insist, that the decision of the General Term, from which they have appealed, is a judgment, within the meaning of that word, as defined by the Code. We think that view is clearly erroneous.

The decision made at Special Term, overruling the demurrer put in by these defendants, was an order and not a judgment. (Code, § 349, sub. 2.) The decision by the General Term, affirming it was also an order, as defined by the Code, section 400. A judgment is "the final determination of the rights of the parties in the action," section 245.

The decision on the demurrer was interlocutory. It determined the plaintiff's right to recover something, or to have some relief, and that the defendants were proper parties, but nothing as to the precise nature or extent of the relief to be granted. The opinion given may have covered more ground. But the order entered determined only that. The nature and extent of the relief to be granted could only be determined by the court at Special Term, on notice to the adverse party, and on proof of such facts as might be necessary to enable the court to give a proper judgment. (§ 269, and § 246, sub. 2.) The determination thus made, specifying the whole relief to be granted, and all questions involved in

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the action, and nothing less than that is a judgment, as defined by section 245 of the Code. It is only from the judgment of the General Term, affirming that determination, or from a General Term judgment absolutely disposing of the merits of the action, and of all questions involved in it, that an appeal can be taken to the Court of Appeals. (§ 11, subs. 1 and 2; *Paddock v. Springfield Fire and Marine Ins. Co.*, 2 Kern. 591; *Beebe and wife v. Griffing*, 2 Seld. 465; *Swarthout v. Curtis*, 4 Coms. 415.)

Upon an appeal to the Court of Appeals, the clerk of the court below is required to transmit to the appellate court a certified copy of the judgment roll. (§ 328.) This cannot be done until there is a judgment declaring the precise relief to which the plaintiff is entitled, and a judgment roll has been filed. By rule 2d of the Court of Appeals, unless the appellant cause this return to be made and filed within twenty days after perfecting his appeal, the respondent, on filing an affidavit, stating when the appeal was perfected, and a certificate of the clerk that no return has been filed, may enter an order dismissing the appeal with costs. It is the policy of the Code to allow but one appeal in the same action to the Court of Appeals, unless a new trial shall be ordered by the latter Court after a final judgment has been rendered.

The affidavits, on which the order appealed from was made, show that, on the application to the court for the relief demanded by the complaint, Townsend and Johnson appeared and were heard. That since judgment was pronounced on that application, the defendants obtained leave to make a case, and a stay of all proceedings on the part of the plaintiff, except settling, entering, and perfecting the judgment. That the defendants have since served a case, to which amendments were proposed by the plaintiff.

Instead of its appearing that there are no questions in the case which can be further litigated, except the question, whether the demurrers were well taken, it distinctly appears that questions have been raised in the proceedings subsequent to the order of affirmance by the General Term, that the defendants have a right to be heard in respect to these questions, and that they have initiated proceedings to obtain a further consideration of them, and that such proceedings have not been abandoned. We are clearly of opinion that the defendants are not in a condition to prosecute the appeal they have taken to the Court of Appeals.

Davis v. Duffie.

There is, therefore, no propriety in interfering to stay the plaintiff's proceedings in consequence of such appeal, and the order appealed from must be affirmed, with \$10 costs.

DAVIS v. DUFFIE, et al.

The plaintiff had formerly brought an action, in this court, for legal relief against some of the defendants in this action. His complaint was dismissed with costs, but without prejudice to an action for equitable relief.

Without having paid the costs of the former action he brought this one to obtain equitable relief.

Held, that the court would not stay the proceedings in this action, as a matter of course, until the costs of the former one were paid.

At SPECIAL TERM, October, 1856.

BOSWORTH, J., held as above stated. Under the former practice a court of law was alone competent to grant the relief sought in the action first brought. A court of equity would not stay the proceedings in a suit brought in it, until the costs of a previous action at law, in which the plaintiff was defeated, were paid, unless the second suit appeared to be vexatious. A court of law was governed by the same rule as to staying proceedings, until the costs of a former suit in chancery were paid. Unless the two suits had been in the same court, or in courts of the same nature, and proceeding on the same principle and in the same mode, the proceedings in the second action would not be staid until the costs of the former one were paid, (2 J. Ch. R. 461; 19 J. R. 196; 7 Paige, 53.) *Perkins v. Hinman*, (19 J. R. 237,) was a case in which both actions were in courts of law, although not in the same court. The motion, by the defendants, to stay proceedings in this action, until the costs of the first action are paid, must be denied. (S. C. 3 Abb. 263.)

VANDERBILT, and others, v. GARRISON.

Certain stockholders in a corporation brought an action to recover from a person, employed by the corporation as its agent, moneys received by him in the course of such agency.

Held, on demurrer to the complaint, that it was bad, for want of an averment, that the corporation, by its officers, had refused to bring an action.

At SPECIAL TERM, October, 1856.

THE defendant demurred to the complaint specifying as grounds:
1st. That the plaintiffs had not a right to maintain the action.
2d. That the complaint did not state facts sufficient to constitute a cause of action.

F. B. Cutting, for demurrant.

H. F. Clark, and *M. Rapallo*, contra.

BOSWORTH, J., sustained the demurrer, on the grounds above stated. (S. C. in 3d Abb. 361.)

VAN VALEN v. LAPHAM.

When a defendant sets up, as a counter-claim, a note made by the plaintiff, payable to a third person, and endorsed to the defendant, the answer must aver such endorsement to have been made before the action was commenced.

The fact that the answer states such note to be a "counter-claim and cause of action existing against the plaintiff, at and before the commencement of the action," is not enough to show that it previously belonged to the defendant. The plaintiff has a right to require the answer to be so full and precise, that he may know whether the defence is to involve a disputed question of fact, or to depend solely on a question of law.

Before all the Justices, October 18, 1856.

THIS action comes before the court on an appeal from an order directing the defendant to amend the part of his answer which

Van Valen v. Lapham.

sets up a counter-claim, so as to make it more definite and certain, by stating, when the note made by the plaintiff, and which the defendant alleges has been endorsed to him, was transferred. The note, by its terms, is payable to a third person, and was due at the time this action was commenced. The answer, although it states the note has been endorsed to the defendant, and that he owns it, does not state when it was endorsed, nor that it was, before the suit was brought.

The defendant insists that the order is wrong, on two grounds. 1st. If it is necessary that a note made by plaintiff, and purchased by defendant, should have belonged to defendant when this action was commenced, in order to constitute it a counter-claim, that fact is sufficiently alleged, as the answer states it to be a "counter-claim and cause of action existing against the plaintiff at and before the commencement of this action." 2d. That it is not essential that the defendant owned the note at the time this action was commenced, that it is enough that it existed and was then due, and that it was transferred to the defendant before the time to answer expired, and belonged to him when the answer was put in.

Seeley & Cheeney, for plaintiff.

H. S. Lincoln, for defendant.

BY THE COURT. BOSWORTH, J.—The order appealed from is not erroneous. A defendant must state, in his answer, the facts constituting his counter-claim, so that the court can determine, from the facts stated, whether one exists. If the answer is so amended as to aver that the note was transferred to the defendant before this action was commenced, no question can arise on the pleadings. If the actual truth requires an averment, that it was transferred after suit brought, then, after the answer has been amended so as to thus allege, the question can be determined by demurrer, or motion for judgment on account of the frivolousness of the answer, whether a defendant can defeat a recovery, and subject a plaintiff to the costs of the action, by purchasing a demand against him after the defendant has been sued, and setting it up as a counter-claim. Either party has a right to be apprised, by a pleading, of the precise facts on which his adversary founds

his cause of action, and to have them so fully pleaded that there may be no uncertainty, whether the merits are to involve a disputed question of fact, or to depend solely on a question of law. By requiring such certainty, the issues to be tried are diminished in number, and the end of a litigation may often be reached much sooner, and at much less expense to both parties.

Order affirmed.

NOTE.—The defendant subsequently amended his answer, and stated the transfer of the note to him to have been subsequent to the commencement of this action. The plaintiff did not reply to the answer, but noticed the action for trial. It was tried before Bosworth, J., without a jury, who gave judgment for the plaintiff, and rejected the counter-claim, because the note held by the defendant was not transferred to him until this action was commenced. The reasons for his judgment are reported in 18th How. Pr. R. 240.

STILWELL and MONTROSS v. STAPLES.

A plaintiff who sues in a court of record, in an action arising on contract, and for the recovery of money only, and proves contested demands, which, with those established by the defendant, exceed \$400 in amount, is entitled to costs as a matter of course, if he recovers any sum whatever. A justice of the peace has no jurisdiction of such an action, within the meaning of sub. 3 of section 304 of the Code.

Demands contested by the pleadings, are "proved," within the meaning of that word, as used in section 54, sub. 3, if admitted at the trial. The admission at the trial dispenses with other evidence, and is itself the proof, on which the justice acts.

A plaintiff is not required to commence an action in a justice's court, and prove demands, which, with those proved by the defendant, shall exceed \$400, and then be dismissed, as a necessary preliminary to suing in a court of record. It is enough to entitle him to costs, that the facts, as proved in a court of record, establish it to be one, of which a justice of the peace, by § 54, has no jurisdiction.

Before all the Justices, except HOFFMAN, J., October 11, 1856.

THIS action was brought to recover the sum of \$657.76 and interest, for manufacturing articles of clothing, and for materials and trimmings furnished. The answer denied that the labor and materials were worth so much, and sets up as a counter-claim, that defendant delivered to plaintiffs, to be manufactured into clothing,

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goods of the value of \$3,000, which the plaintiffs agreed to manufacture, and to insure against loss and damage by fire; that a part of them, of the value of \$855, was destroyed by fire; that they were, in fact, at the time of loss, so insured, and that the plaintiffs, before this action was brought, had received money arising from such insurance more than sufficient to satisfy their claim, and prayed that sufficient of such moneys be applied to satisfy their claim, and that the defendant have judgment for the balance. On the trial, plaintiffs' claim was admitted to be, including interest, \$832.97. The amount of the defendant's claim was, by consent, to be ascertained by the court, subject to the opinion of the court at General Term, whether, upon the facts proved, the defendant was legally entitled to be credited with any part of the insurance moneys realized by the plaintiffs from the policy in force, at the time of the loss. The court decided that the defendant was legally entitled to \$831.82 of such moneys, being enough to satisfy the plaintiffs' claim, less \$1.15, and for that sum the plaintiffs had judgment. Each party claimed the costs of the action as a matter of right, and that point the court had now decided. A reply was put in to so much of the answer as set up a counter-claim.

BY THE COURT. OAKLEY, Ch. J.—The defendant insists, that this being an action for the recovery of money, the plaintiffs cannot recover costs, for the reason that they have recovered less than \$50, and that, as they are not entitled to costs, he is entitled to them as a matter of course, under section 305 of the Code.

The plaintiffs insist, that this is an action of which, according to section 54, a court of a justice of the peace has no jurisdiction, and therefore their right to costs is absolute.

Section 304 of the Code declares, that "costs shall be allowed, of course, to the plaintiff upon a recovery, in the following cases:"—"In an action of which, according to section 54, a court of a justice of the peace has no jurisdiction."—Sub 3.

Section 54, reads thus: "But no justice of the peace shall have cognizance of a civil action," in certain cases which it enumerates. Its 3d subdivision is in these words: "nor of a matter of account, where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars."

The claim of the plaintiffs, the amount of which was controverted by the answer, as established at the trial, of itself exceeded \$400. This was extinguished, except the small sum which the plaintiffs recovered, by claims in favor of the defendant, which he proved at the trial. Although the amount of the plaintiffs' claims was admitted at the trial, yet such admission was as much proof of it, within the meaning of the statute, as if it had been established by witnesses in open court. The existence of the claim on the part of the plaintiffs, to the amount demanded, was contested by the pleadings, and that of the defendant was wholly denied. We think it quite clear that section 54 prohibits a justice of the peace from taking cognizance of such an action. Section 304, sub. 3, is explicit, that costs shall be allowed to a plaintiff, in such a case, as a matter of course, if he recovers any amount. A justice of the peace could not investigate the claim of the defendant, and on proof of it to his satisfaction to \$831.82, in amount, allow it as proved, and give a valid judgment in favor of the plaintiffs for the difference between the two claims. A plaintiff is not required to commence an action in a justice's court, and prove his accounts to an amount exceeding \$400, including those proved by the defendant, and be dismissed from that court in consequence, as a necessary preliminary to commencing an action in a court of record. It is enough to entitle him to costs, that the facts of his case, as proved in a court of record, establish it to be one, of which a justice of the peace, by section 54, has no jurisdiction. That section, by declaring that a justice shall not take cognizance of an action like this, when the facts are such as have been proved in this case, nor of an action of slander, or assault and battery, specifies them as cases of which he has no jurisdiction, within the meaning of sub-division 3, of section 304.

Under any other construction of the Code, a plaintiff, having any amount less than \$50 due to him, would be remediless, if the accounts of both parties exceeded \$400. If he stated his whole cause of action, and claimed damages for over \$100, a justice of the peace would have no jurisdiction, because section 53 is express, that he shall only have jurisdiction when the sum claimed does not exceed \$100. If he claimed just \$100, and took judgment for that sum, his own account would be merged in the judgment and extinguished, and the defendant might then bring a

Stillwell v. Staples

separate action and recover his whole claim. The neglect of a defendant, in a justice's court, to set off his demands against the plaintiff, is no bar to an action to recover them, when they amount to \$100 more than the judgment which the plaintiff shall have recovered. (2 R. S. 4th ed. 236, § 56.) [58.]

And, in a justice's court, "if upon the trial of a cause, it shall appear that the amount of the plaintiff's claim together with the demands set off by the defendant, according to the preceding provisions," (the provisions of the statute in relation to set-offs,) "exceed four hundred dollars, judgment of discontinuance shall be rendered against the plaintiff, with costs." (Id. § 52.) [Sec. 54.]

We think it obvious that these statutes expressly prohibit a justice of the peace from passing judgment between parties, upon demands of each against the other, arising upon contract, and amounting together to over \$400, when such demands are contested. That, in such a case, a plaintiff who sues in a court of record, and proves contested demands, which, with those established by his adversary, exceed \$400 in amount, is entitled to costs, as a matter of course, if he recovers any sum whatever.

In this view of the case, the plaintiffs are entitled to the costs of the action, and judgment will be entered accordingly.

Stillwell & Swain, for plaintiffs.

C. Bainbridge Smith, for defendant.

JENNINGS v. ASTEN.

The verdict of a jury on the execution of a writ of inquiry by the sheriff of the city and county of New York, to assess a plaintiff's damages, on defendant's failure to answer, will not be set aside merely because the persons summoned as jurors were not on the list of jurors selected by the commissioner of jurors, no objection having been made on executing the writ, and it not appearing that the persons were not fit and competent jurors.

Nor because the complaint was read in evidence to the jury, it not appearing that it was offered for any specific purpose, for which it could not properly be read. Nor on account of the excessiveness of damages, when the evidence on which the verdict was rendered is not disclosed by the affidavits on which the motion was made.

At SPECIAL TERM, November 1, 1856.

THIS action was brought to recover damages for ejecting plaintiff's servants from his jewelry store, closing it up, and posting a bill on it, containing the words "to let." Defendant failed to answer, and the court ordered that a writ of inquiry issue to the sheriff to assess the plaintiff's damages. The writ was executed. The defendant appeared and examined witnesses. He now moves to set aside the inquest, because:—

1st. The sheriff did not summon, as jurors, persons on the list prepared by the commissioner of jurors.

2d. The sheriff, against the objection of defendant, allowed the complaint to be read as evidence to the jury. The opposing affidavit stated, that defendant objected on the ground "that the complaint was matter of record, and belonged to the sheriff or under sheriff, who conducted the proceedings, to be considered by him exclusively. That said under sheriff stated the practice to be, for the plaintiff to read the complaint, and the jury to give such weight to it as they thought proper; that defendant's counsel excepted to the decision allowing it to be read.

3d. On the ground of excessive damages.

George W. Stevens, for defendant.

S. E. Church, contra.

BOSWORTH, J.—It is not alleged that the persons serving as jurors, were not in fact competent jurors, nor is any objection to them suggested, except that they were not of the number who had been selected by the commissioner of jurors to do jury duty. No objection was made to the regularity of the sheriff's proceedings in summoning the jury, or the qualification or fitness of either of the jurors, on executing the writ. There is no provision in chap. 495 of the laws of 1847, (p. 734,) requiring the sheriff of the city and county of New York, on executing writs of inquiry, to summon only such persons as the commissioner of jurors may have selected to serve.

Nor does that act provide that the commissioner of jurors, or any other officer, on the requisition of the sheriff or otherwise, may designate the persons whom the sheriff may summon as jurors in such cases. I think there is nothing in the objection first taken, as it is presented on this motion.

The jury were to assess the damages which the plaintiff had sustained, by reason of the facts mentioned in the complaint constituting the cause of action. It was proper to read the complaint, in order that they might know what those facts were. By failing to answer the complaint, the material allegations contained in it were, for the purposes of the action, admitted to be true. (Code, § 168.) The objection taken was, that it should not be read as evidence at all. This objection is not tenable. If the objection had been taken that it could not be read as evidence of the amount of damages the plaintiff was entitled to recover, and the right to read it for that purpose had been insisted on, and it had been allowed to be read expressly for that purpose, a different question would be presented.

The objection alleged to have been taken was too broad to enable the court to say the decision was erroneous. Neither can the court say the damages were excessive. Testimony to that point was given on both sides. What that testimony was is not disclosed by the affidavits. The court, therefore, cannot see that the damages are excessive. The complaint claimed damages to the amount of \$1000, and the jury assessed them at \$450. This motion is addressed to the equitable consideration of the court. The

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evidence on which the jury acted not being before the court, it is unable to say that any injustice has resulted to the defendant from the proceedings.

The motion is, therefore, denied.

CHARLES GRAHAM v. FREDERICK W. CAMMAN.

Where a demurrer is interposed to a complaint, under the 6th sub. of section 144 of the Code, the true rule is, that such a demurrer applies only to such defects as would render the count bad on general demurrer at law, or bad for want of equity in chancery.

The complaint, therefore, to be overthrown by such demurrer, must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever.

Where the demurrer admits facts enough to constitute a cause of action, the complaint will be sustained; and if the defendant requires a greater degree of certainty than is found in the complaint, he must seek his relief by a motion under the Code, that the pleading be made more definite and certain.

At GENERAL TERM, November, 1856. Before all the Judges.

THIS action comes before the court, on an appeal from an order of the Special Term, overruling a demurrer to the complaint.

The complaint was as follows:—

That the defendant, on the 10th of May, 1855, became, and was indebted to the plaintiff in the sum of \$446.25, upon a balance of an account stated, and then due and owing to this plaintiff; and which the said defendant then and there agreed and promised to pay, but that he has neglected and refused to pay the same, except the sum of \$150 paid by him to the plaintiff on the 22d of August, 1855, on account of the aforesaid balance of indebtedness. And further, that the defendant remains indebted to the plaintiff in the sum of \$296.25, with interest, &c. For that amount, and costs, judgment is demanded.

A general demurrer was served, stating that the complaint did not state facts sufficient to constitute a cause of action.

The demurrer was overruled, and from that order the defendants appealed.

Mr. Booth, for plaintiff.

Mr. Robinson, for defendant.

BY THE COURT.—HOFFMAN, J.—This case cannot be well distinguished from that of *Cudlip v. Whipple* in this court, (1 Abbott's Rep. 106; 4 Duer, 610.) The difference is only in the omission to state the nature of the items of the account, viz., for money paid, laid out, and expended. It was not alleged that the account had been stated. That case was decided upon in *Allen v. Patterson*, (8 Seld. 496,) holding that a complaint in an action for the recovery of goods sold, substantially in the old form of a declaration in *indebitatus assumpsit*, was good under the Code.

The old form of a declaration on an account stated is found in 2 Chitty's Pleading, 90. It was—

"That, whereas the defendant had, on, &c., at, &c., accounted with the plaintiff of and concerning divers sums of money, from the defendant to the plaintiff before that time due and owing, and then in arrear and unpaid; and upon such accounting, the said defendant was then and there found in arrear and indebted to the plaintiff in the sum of ———, and thereupon, being so indebted, he promised to pay," &c.

It is obvious that the 6th subdivision of the 144th section of the Code, as to demurrers, has been framed from the form of the general demurrer at common law, or in equity. Such must have gone to the whole cause of action, and be for matter of substance, not of form. (See Chitty on Pleading, 664, and cases.)

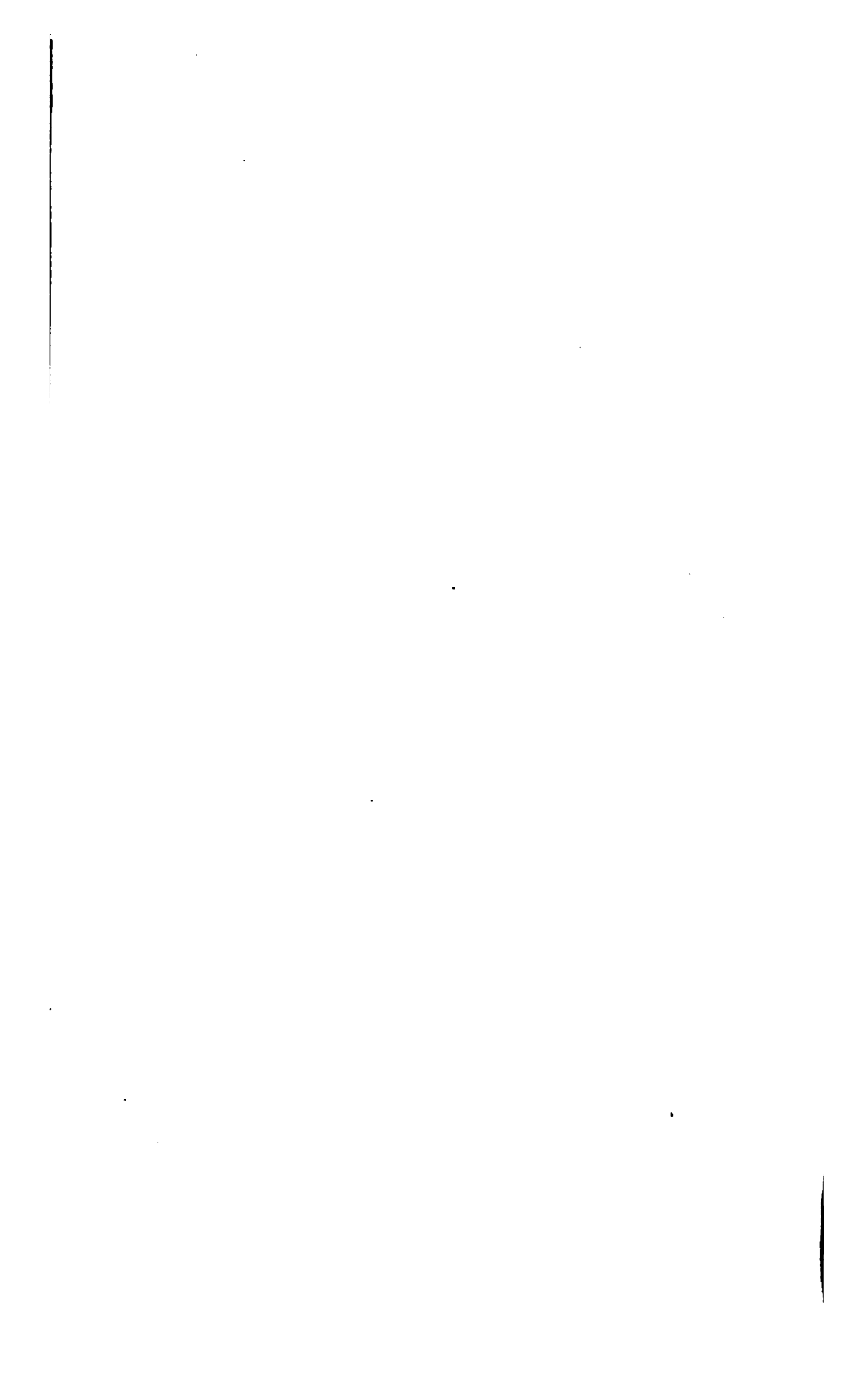
In *Richards v. Beairs*, (28 Eng. L. & Eq. Rep. 157,) the question was under the 50th section of the common law procedure act, which is substantially the same as the 6th subdivision referred to. The court say, that the question was, whether the declaration would have been good upon general demurrer before the act, and it was held bad upon that ground. Compton, J., said, "If we are to hold pleadings good where the parties do not choose to say what they mean, we should be getting into the region of ambiguity and uncertainty, which would be a worse evil than that which the statute intended to remedy."

The rule was well stated in *Richards v. Edich*, (17 Barb. 260.) A demurrer under the 6th subdivision applies only to such defects

as would render the count bad on general demurrer at law, or bad for want of equity in chancery. The complaint, therefore, to be overthrown by such a demurrer, must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever. Where the demurrer admits facts enough to constitute a cause of action, the complaint will be sustained; and if the defendant requires a greater degree of certainty than is found in the complaint, he must seek his relief by a motion under the Code, that the pleading be made more certain and definite.

We consider the rule, as thus stated, to be a true and beneficial one; and it is so to be regarded in this court.

The order of the Special Term, overruling the demurrer, must be affirmed, with costs.



INDEX.

A

ACTION.

1. As a general rule, an action under the Code is not commenced until the actual service of the summons. *Wiggin v. Orser*, 118
2. The only exceptions are those created by §§ 99 and 135 of the Code. The first exception is confined to cases in which the statute of limitations is set up as a defence. The second, to actions against non-resident or absconding debtors, and foreign corporations. *id.*
3. Hence, in an action against a sheriff for an escape, the voluntary return of the prisoner before the actual service of the summons, although after its delivery to the coroner, is a good defence. *id.*
4. The plaintiff, in an action for the recovery of land, is bound to show, either a prior actual possession, or a paramount legal title. *Barton v. Drepper*, 130
5. In this case, all the Judges concurred in holding—
First. That the plaintiff could not sustain the action upon the ground that the strip or parcel of land demanded, and which was formerly part of a public street in the city of New York, had been allotted to them upon a partition between the heirs of G. Lorrillard, deceased. *id.*
6. Second. That the action could not be maintained upon the ground that Mrs. Bartow, as a co-heir of G. L., was entitled to an undivided tenth of the parcel demanded, even upon the assumption that G. L. was the owner, since it appeared from the evidence that her husband had consented to the proceedings by which the defendant had acquired his title. *id.*
7. And lastly, That had all the heirs of G. L. united in the action, there could have been no recovery, since the evidence was wholly insufficient to show that either the title, or the possession, was ever vested in the ancestor. *id.*
8. Hoffman, J., was also of opinion that the title shown by the defendant, and which was derived from the corporation of the city, was valid and unimpeachable, upon the ground that the street of which the parcel demanded in this action was formerly a part, and which had been regularly closed, was an ancient public street of the city, and that in relation to all such streets, it is a matter of fact, and of legal presumption, that the fee is vested, exclusively and absolutely, in the corporation. *id.*
9. Since the Code, there is no distinction between suits at law and in equity, arising from the form of the proceedings, or the jurisdiction of the court. *General Mutual Ins. Co. v. Benson*, 168
10. When the owner of a house and lot constructs a vault within the limits of the street in front thereof, and covers

the same with flagging so as to form a sidewalk, he acts at his peril. He is responsible for all injuries resulting from its want of entire safety, for all the purposes for which the public have a right to use such sidewalk. *Con-gress v. Morgan*, 495

11. It is no defence to an action, for an injury sustained by the breaking and falling in of the covering of such vault, that the owner was not guilty of negligence in the manner of its construction. *id.*

12. Nor can the owner defend on the ground that the work was actually done by a third person, with whom he had contracted for its performance, although the terms of the contract required the contractor to use stones, for such covering, in all respects sufficient. *id.*

13. Nor is the owner protected, by showing that the covering had answered the purpose for which it was intended for a year after the completion of the work, and that he had no knowledge that the covering was insufficient. *id.*

14. One who excavates the highway does so at his peril, and if the safety of passers by, or travellers, is impaired, and injury to them results, he is liable; the question of negligence or no negligence, on the part of the owner, in such case, does not arise. *id.*

15. How far, in the city of New York, an authority from the corporation would affect, in such cases, the liability of the owner, *quere?* *id.*

16. Were such an authority shown, the liability of the owner might depend upon the question of negligence in the performance of the work. *id.*

17. When a vendor of real estate conveys it by a full covenant warranty deed, and a prior outstanding mortgage, unsatisfied of record, is discovered, which the holder of it declares to be valid, and that money is due upon it, and the grantor insists nothing is due or owing upon it, the grantee may bring an action to have it satisfied of record on paying what may be found due. He may make his

grantor a defendant, so that a complete determination of the controversy may be had in one action. To that end, he is not only a proper but a necessary party. Such a complaint does not improperly unite several causes of action. *Wandle v. Turney*, 661

See ASSIGNMENT.

MALICIOUS PROSECUTION.

AGREEMENT.

1. The defendant and two associates, owners of houses and lots on Twenty-first street, entered into an agreement with the plaintiff, by which they severally bound themselves to pay to him the sum of \$200, in consideration of his erecting on certain lots in the rear of those owned by themselves, three or more dwelling-houses, covering the entire front of his lots, of such character and description as to be ineligible for tenement-houses, or for any trade or occupation likely to be offensive or injurious to them. He erected four dwelling-houses, covering the entire front of his lots, but one of them was constructed with a carriage-way or passage, unconnected with the house, but opening on the street, and leading to the rear of the lot, so that stables or other buildings might have been erected, having a common entrance and exit by the carriage-way, on the rear of each lot.

Held, that as the manifest object of the defendant and his associates was to prevent the erection on the plaintiff's lots of any building that might operate as a nuisance to themselves, and as the opening of the carriage-way would enable the plaintiff to erect such buildings, should he deem it expedient, it was a breach of the spirit and intention of his agreement, and, therefore, a bar to his recovery of the sum which the defendant had stipulated to pay. *Voorkies v. Anthon*, 178

2. Payment by a debtor of a part of a sum of money; which is actually due and payable, is no consideration for an agreement by the creditor to forbear or give time for the payment of the residue.

3. An agreement by the creditor to give further time for the payment of a sum already due, in consideration of the debtor's agreement to pay more than legal interest, is binding upon neither party. *Hunt v. Bloomer*, 202

4. Upon the dissolution of a partnership between the plaintiffs and defendant, the former executed an instrument, (the latter not being a party,) in which the withdrawal of the latter was recited, and the plaintiffs agreed to pay him certain sums, and give him certain notes, as specified. They also stipulated to hold him harmless as to all matters of the concern, except, that as to certain items and notes then remaining unpaid to the firm, if any loss should be sustained, he, the defendant, was to share and pay to the plaintiffs seven-sixteenths thereof.

Four days afterwards, the defendant executed and delivered a receipt, acknowledging the reception of the cash and notes under the agreement signed by the plaintiffs, dated the 31st of December, 1853, that above stated.

Held, that the operation of the receipt was a recognition of the instrument signed by the plaintiffs, and made the defendant as much governed by its provisions, as if he had executed it. *Buchanan v. Chaseborough*, 238

5. In an action between partners, for an accounting, when the complaint alleges, and the partnership agreement states, that the plaintiff contributed \$2,250 of capital, and the answer denies that the \$2,250 was contributed as capital, and avers that it was to be paid by the plaintiff for an equal interest in the business, that the money was paid on that basis, and that both parties have acted upon the understanding that such was the meaning of the agreement, the allegations of the answer are sufficient to present the issue, whether the agreement was, by mistake, so drawn as not to express the actual agreement of the parties. *Jesse v. Tucker*, 393

6. When the written agreement of parties is clear and unambiguous in its terms, clear proof of a mistake is required, to justify the court in holding, that it does not express the actual intent and contract of the parties to it. *id.*

ADVERSE POSSESSION.

1. The plaintiff and defendant were adjoining owners of parcels of ground, derived from a common source of title, by deeds, dated, respectively, in 1828 and 1829.

The strip in question lay between the southerly wall of a hotel, built in 1831, by the grantor of the plaintiff, and the northerly wall of a building, called a bindery, erected subsequently (but in 1831 or 1832) by the grantor of the defendants. But the foundation of the latter wall, below the surface, covered the strip in question, and touched the foundation-wall of the hotel. Above the surface, the wall of the bindery receded, so as to leave the space in question. After being carried up some distance from the ground, the westerly wall of the bindery was built over the space, and touched the wall of the hotel; and, on the easterly side, the wall of the bindery was run across the space. There was some evidence that the roof of the latter building covered the whole of the space in question.

This space, called an "alley-way," "drain," or "passage-way," had always been used by the occupants of the hotel, from 1831 to 1847. The opening, to the westward, into Theatre alley, was shut by a gate, erected and maintained by them, and the owners of the adjoining lot, under whom the defendant claimed, never claimed a right to the alley, or to any interest therein, during that period.

Held, that neither the extension of the foundation-wall below the surface, nor the running the wall, in the rear, across the strip, nor the extension of the wall over the drain in front, and the roofing over the whole, though done more than twenty years before the trial, was sufficient to constitute an adverse possession, to divest the plaintiffs' title by deed. *Miller v. Platt*, 272

2. An adverse possession, to constitute a bar, must be an actual and a hostile possession, and not a mere trespass. It involves an assumption of the right to the land in question, from the time it is alleged to have commenced, and a continued holding, with such continued assertion of right. Claim of title, and exclusive claim, is essential to it. *id.*

AMENDMENT.

See PRACTICE (Amendment).

ASSIGNMENT.

1. The assignor of the plaintiff had loaned to the defendant large sums of money, through the years 1851 and 1852, payable on demand. In November, 1853, he accepted various promissory notes for the amount then due, payable at different periods, some of which had not matured at the commencement of this action. To sustain it, as thus brought for the whole amount loaned, it was alleged by the plaintiff that the extension of credit by the notes, was obtained through fraudulent representations of the defendant, as to his property. It was also alleged, that the original loan was obtained by similar frauds.

The jury, (under a charge of the court, that the plaintiff could not recover unless the fraud was proven,) found for him, thus finding the fact of fraud.

Upon the well-settled rule of law, the assignor could have recovered for the money originally lent, surrendering the notes thus fraudulently given, at the trial.

Held, that an assignee of the claim and notes had the same right. That the assignment was not a mere transfer of a right to receiver for a tort, but of a money demand, which the fraud in procuring the extension reinstated in its original force and character. *French v. White*, 254

2. The allegation of fraud, in procuring the original loan, was in no way material to the right of action, nor for any purpose of the trial, except as evidence of a premeditated scheme to defraud the party. *id.*

3. Although fraud had been made out, in obtaining the loan, the plaintiff could not have recovered, unless fraud in procuring the extension was also proven. If there was no fraud originally, yet the action could be sustained if there was fraud in inducing the party to take the notes. *id.*

ATTACHMENT.

1. Bonds executed by a railroad company, and in the hands of its agents, to be negotiated for its use, cannot be seized on an attachment against the company, so as to give the attaching creditor a right to enforce the bonds against the company, or any claims against parties who had guaranteed such bonds, for the better enabling the company to negotiate them. *Coddington v. Gilbert*, 72

2. Property which may be attached under the 227th section of the Code, is property as defined in the 463d and 464th sections. "Personal property includes money, goods, chattels, things in action, and evidences of debt." Such bonds could not be regarded as of either class. The fact that the agents had an interest in the bonds, with a power to sell them for reimbursement of advances, does not make a difference as to the right to attach. *id.*

ATTORNEYS AND COUNSELLORS.

See PRACTICE (Attorneys).

B

BANK—SAVINGS.

1. F. W., in his lifetime, deposited several sums with the defendants, amounting in the whole to \$198.68, and when he made the first deposit, a book called a pass-book, was delivered to him, in which the sum deposited was entered by an officer of the bank. When the plaintiff, his administrator, demanded payment of the whole deposit and interest, he did not, although required, produce this book, nor allege that it was lost or destroyed, nor was any proof of its loss or destruction given on the trial of this action, in which judgment was demanded for the whole deposit and interest. When the deposits were made, a regulation of the bank was in force, and was put up in a conspicuous place in the banking-room, requiring every depositor, when

demanding any payment of his deposit, to produce the original pass-book.

Held, that this regulation was authorized by the charter of the bank, that it was not unreasonable, and that the intestate was chargeable with knowledge of its existence, and consequently, that it was binding upon the intestate and upon the plaintiff.

Held, that as the regulation had not been complied with, the plaintiff, upon the evidence given upon the trial, was not entitled to recover. *Warhus v. The Bowery Savings Bank*, 67

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The defendants owned a vessel, which formed part of a line of E. D. Hurlbut & Co., running between New York and Mobile, and consigned by E. D. H. & Co. to W. & S. of Mobile. W. & S. collected the freight, paid the disbursements, and, by direction of the captain, procured freight for the vessel to Barcelona. They having advanced \$264.36 over and above the freight collected, and he wishing more money, they advanced him the further sum of \$235.64. The captain drew a bill to his own order on two of the defendants for \$500, and endorsed it. The plaintiff discounted it, at the instance of W. & S., who did not endorse it. They received the money, and credited it in their account. The drawees refused to accept or pay the bill. Some months subsequently, W. & S. assigned to the plaintiff their account against the owners, and all claims by reason of the advances they had made to the captain of the vessel.

Held, that the mere drawing and negotiation of the bill, which the drawees refused to accept, gave to the plaintiff no right of action against either defendant. *Cochran v. Sherman*, 13

2. The claim of W. & S. not having been assigned to the plaintiff on his discounting the bill, but, on the contrary, having been paid with the proceeds of it, the subsequent assignment of it to the plaintiff was a nullity, and gave him no additional claim upon the defendants. *id.*

D.—V.

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3. A note was lodged at a bank for collection, and demand for payment was made there, with inquiry of the officers as to the residence of the maker. The directories were at once consulted, and her name not found. No inquiry was made of the actual holder of the note; and it appeared, that the maker, being a married woman, kept a boarding-house in the city. *Packard v. Lyon*, 82

4. *Held*, that due diligence had not been used in presenting the note for payment. *id.*

5. Where promissory notes, endorsed for the accommodation of the maker, are used as collateral security for a credit granted to the maker, although the endorsers may justly be considered as sureties, still the legal character of their contract, as that of endorsers, is not changed, and no objection can, therefore, be taken to it under the statute of frauds. *Zellweger v. Caffe*, 87

6. Where, by the agreement between the makers of the notes, and the persons by whom the credit was granted, the credit is to be made available by bills drawn by the former, and accepted by the latter, the fact that subsequent bills on account of the credit, were drawn by an agent of the makers, and the proceeds applied by him to their benefit, and according to their instructions, is not such a departure from the terms of the agreement as can operate to discharge the endorsers as sureties. *id.*

7. If, by the terms of the agreement, the persons granting the credit are to be placed in funds to meet their acceptances, by approved bills, to be remitted to them within a certain time before their acceptances fall due, the failure to make the stipulated remittances in due season, is a breach of the agreement, which gives to the persons granting the credit an immediate right of action upon the promissory notes held by them as collateral security for the performance of the agreement. *id.*

8. In such an action, they are entitled to recover the whole amount of their acceptances, that were not covered by remittances, when the action was brought.

- Upon these grounds, judgment rendered for the plaintiffs, for the whole amount of the endorsed notes upon which these actions were founded. *id.*
9. The defendant, at the request, and for the accommodation of L. P. & Sons, of London, drew a bill of exchange upon them, which they accepted, for £1,364 17s. 5d. But the acceptors placed the bill in the hands of another house, to be discounted for their benefit, and this house transferred the bill, before its maturity, to the plaintiff, as collateral security for the repayment of a loan of stock. *Lysaght v. Phillips*, 106
10. *Held*, that the finding of the referee, that the bill had been transferred to the plaintiff for a valuable consideration, and without notice of its misapplication, was sustained by the evidence. *id.*
11. The acceptors failed, and after their failure entered into a deed of composition with their creditors, to which both they and the plaintiff, as one of the creditors, were parties. The deed contained an absolute release of the acceptors, and also a covenant not to sue them, but it contained also a reservation of the rights and remedies of the creditors against third persons, not parties to the deed, who were or might become liable as drawers, endorsers, or otherwise. *id.*
12. *Held*, that the effect of this reservation was, not only to preserve the plaintiff's right of action against the defendant, but to continue the liability of the acceptors to the defendant, in case he should be compelled, as drawer, to pay the bill, and that consequently the release and covenant in the deed, as they did not affect the rights of the defendant, constituted no defence to the present action. *id.*
13. The plaintiff agreed, upon the sale of goods to one, to take the note of a third person in payment. The goods were delivered upon tender; he refused to take the note, having heard some rumors, in the interval, to the discredit of the maker. The plaintiff (the seller) remained, for several months afterwards, without demanding it. *Des Arts v. Leggett*, 156
14. *Held*, that the purchaser had a right to dispose of the note, for his own purposes, as he thought proper. But that he had also the right to retain the note, and upon being sued for the price, to make a proffer of it; when the question as to whether the seller was bound to take it would be disposed of. *Des Arts v. Leggett*, 156
15. *Held*, that under the circumstances of the case, the purchaser had not exercised a disposing power over the note, by an assignment which he had made; but was to be treated as still retaining the control of it, to answer for the price of the goods to the seller. *id.*
16. *Held*, that the defendants, the makers of the note, were responsible to the plaintiffs for the amount. That the latter had an interest which entitled them to sue. *id.*
17. In case of a note not in fact negotiable, when the claim is made by the original party to whom it is given, the destruction of the note is matter of fact for the jury to determine; and, if established, no indemnity is requisite. Perhaps, in a doubtful case, the analogous rule of a Court of Chancery may justify the court in demanding it. *id.*
18. The Revised Statute, (2 R. S., p. 406, §§ 75, 76,) is limited to negotiable paper, and to a lost bill or note. The party has a right to require indemnity before payment, but may waive it and obtain it at the trial. *id.*
19. An instrument, which, in its terms and form, is a negotiable promissory note, does not lose that character because it also states, that the maker has deposited bonds as collateral security for its payment, and that he agrees, on non-payment of the note at maturity, that they may be sold in a manner, and upon a notice specified, and he will pay any deficiency necessary to satisfy the note, and the expenses of such a sale. *Arnold v. Rock River Valley Union R. R. Co.*, 207
20. The whole sum named, being made payable to order, on a day certain, in money, and absolutely, and the collateral contract, relating solely to the money promised to be paid, and being

- in addition to the principal contract, and not in terms, or legal effect, a modification of it, the note, as to the sum promised to be paid absolutely, is negotiable, and the endorers of it may be charged and prosecuted as endorers of negotiable paper. *Arnold v. Rock River Valley Union R. R. Co.*, 207
21. Where a promissory note was given by an under-tenant for rent payable in advance, and came in due course of business to the hands of the plaintiff, for value, a dispossession of such under-tenant by the superior landlord, for the non-payment to him of the rent afterwards becoming due to him by his immediate lessee, is no defence to the plaintiff's action on the note. *Brooks v. Christopher*, 216
22. *Quere*, Whether, where such dispossession took place after the under-tenant had himself made default, by not paying his note, the eviction would have constituted any defence to an action on the note by the lessee himself? It seems not. *id.*
23. In an action against the endorser of a note, endorsed for the accommodation of the maker, when the defence is, that it was usuriously discounted at its first inception, the purchaser, having bought it from a third person, after it was so endorsed, may show that the seller, by authority of the endorser, represented it to be business paper, and that it was purchased, relying on the truth of such representations. *Benedict v. Caffe*, 226
24. When the maker of a note, payable at no place named, at the time of making it, has a known place of business, but, before its maturity, fails and makes a general assignment of all his property to one of the endorers, for the benefit of creditors, and the assignee transacts his business of assignee at such place, that fact alone, will not make a presentment of the note, and a demand of its payment at that place, sufficient to charge the endorers. 2. If it has ceased to be the maker's place of business, a demand must be made of him personally or at his place of residence. 3. When neither has been done, the question becomes one of due diligence, to find the maker, or his place of residence. *id.*
25. And, in such a case, a plaintiff may give in evidence papers, executed by the endorser, and delivered to the seller, as evidence of his authority to so represent, and the declarations, accompanying such delivery, averring such a purpose, although the papers, by these terms, may not be evidence of such a fact. Especially may this be done, when the terms of the paper are not necessarily inconsistent with the truth of such accompanying declarations, although the paper is dated, and was delivered, after the note was sold, and the representations were made, on the faith of which the note was bought. *id.*
26. The rule that protects the *bona fide* holder of negotiable paper, fraudulently or feloniously put into circulation, applies to all negotiable paper, whether payable to bearer, or order, immediately, or on a future day. *Gould v. Segee*, 260
27. The protection of the rule is not confined to those whose usual business it is to deal in negotiable paper, but extends to every person to whom such paper may be lawfully transferred, and who, by the payment of value, may acquire a title. *id.*
28. The satisfaction of a precedent debt, this court has frequently decided, is a valuable consideration, within the meaning of the rule, and this, since the decision of the Court of Appeals, in *Youngs v. Lee*, (2 Ker. 552,) must be deemed the settled law of the state. *id.*
29. When a parting with value is proved, the amount of the consideration paid is not otherwise important than as bearing on the question of actual or constructive notice. *id.*
30. Hence, when usury is not set up as a separate defence, unless it is so gross as to create a presumption of fraud, the proof of its existence may be justly disregarded. *id.*
31. A person whose name, written by himself, is on the back of a negotiable bill or note, is liable as an endorser to

- a *bond fide* holder, although he may not have delivered the paper to any one for the purpose of transferring a title. *id.*
32. The defendants, in consideration that the plaintiffs would furnish to one Ackley such coal as he might from time to time require, promised to accept the bills drawn upon them by Ackley, in favor of the plaintiffs, for the price of coal so delivered. A bill for \$656.37 was drawn upon them by Ackley, for coal so furnished, which, upon its presentment by the plaintiffs, the defendants refused to accept. *Blakiston v. Dudley*, 373
- Held*, that the promise of the defendants, not being in writing, was void, under § 6 of the Rev. Statutes, relating to promissory notes and bills of exchange. *id.*
33. *Held*, that the plaintiffs were not within the exception created by § 10 of the Statutes, as they had neither drawn, nor negotiated, the bill in question. *id.*
34. *Held*, that the exception only applies to those who, having transferred a bill for value, have, in consequence of its non-acceptance, been rendered liable as drawers or endorsers. *id.*
35. When a party purchases accommodation paper, at less than its face, on representations, made by the parties to it, that it is business paper, and on which he relies, he is entitled to recover the whole sum payable, by its terms, although it exceed the amount paid for it, with the legal interest thereon. *Burrall v. De Groot*, 379
36. *Semble*, that the question whether the protest of a foreign bill of exchange is properly authenticated depends upon the law of the state where payment was demanded and the protest made. *Ross v. Bedell*, 462
37. A seal, stamped upon paper of sufficient tenacity to retain the impression, is a seal within the strictest rules of the common law. *id.*
38. When a certificate of protest is properly authenticated by the seal of the notary, no proof of his signature, or of his authority to act, is required. *id.*
39. When the certificate states that the notary went to the place of business of the acceptor of a bill, to demand its payment, and found the doors closed, it will be intended that he took the bill with him so as to enable him to demand its payment in the usual and proper form. *id.*
40. The holder of a negotiable bill or note is not bound to prove that he gave value for it, merely because it has been proved, on the part of the defendant, that the bill or note was without consideration as between the immediate parties, i. e., was accommodation paper. *id.*
41. But when it appears that the bill or note was fraudulently negotiated or put into circulation, the plaintiff must prove a valuable consideration to entitle him to recover. *id.*
42. The provisions of the Revised Statutes "of promissory notes and bills of exchange," embrace all bills, wherever drawn, that are to be accepted and paid within this state. *New York and Virginia State Stock Bank v. Gibson*, 574
43. To render the drawee of a bill liable as an acceptor upon a promise in writing to accept, under section 8 of the Statute, the promise must be unconditional, and if conditional when made, it is not rendered binding by a subsequent performance of the condition. *id.*
44. Under section 10 of the Statute, no action can be maintained to recover damages for the refusal to accept a bill, except by the person to whom the drawee had promised to accept it, and who, upon the faith of such promise, had drawn or negotiated the bill. *id.*
45. The mere fact that the drawee has funds of the drawer creates no obligation to accept a bill which a payee or endorsee can enforce. *id.*
46. An acceptance procured by a false representation is not rendered valid by the fact that the acceptor was legally bound to accept a former bill of the same amount.

CHECKS.

1. An endorsee of a dishonored check, who has knowledge of the fact, takes it subject to every defence legal or equitable that could have been made against his endorser. *Anderson v. Busted*, 485

COMMON CARRIERS.

1. In an action against the carriers of goods by express, to recover the value of a diamond pin, received at New York, to be delivered at Philadelphia, the fact that the complaint states a delivery to the carriers at 59 Broadway, while the proof is of a delivery at an office in Canal street, is no obstacle to a recovery. The variance is immaterial. So is the omission to state, as a part of the carrier's contract, that he was not to be liable for any loss or damage, unless proved to have occurred from his fraud, or gross negligence. In such a case, proof of the delivery and acceptance of the goods to be carried, of a demand of them at a proper time and place, and of a refusal to deliver them, without explanation, is sufficient, in the first instance, to entitle the plaintiff to recover. *Newstadt v. Adams*, 43
2. It is only when an actual loss is shown, that a plaintiff, under such a contract, is bound to prove that the fraud or gross negligence of the carrier, caused the loss. When the contract limits the liability to \$150, unless the nature and value of the property are disclosed when delivered, to the carrier, the plaintiff, *prima facie*, cannot recover beyond that sum, though the property is clearly proved to be worth more. *id.*
3. A contract by a railroad company, for the transportation and delivery of goods, to a point beyond its own limits, is settled to be a valid contract by the Court of Appeals. *Schroeder v. Hudson River R. R. Co.*, 55
4. When goods were delivered in New York to the company's agent, to be carried to Chicago, and they were not carried there, the defendants were held liable, although the plaintiff had made no demand of them at that place. It ap-

peared that the company had not an office or agent there of whom demand could be made. *id.*

5. The duty of a common carrier is, to deliver the goods to the owner or his agent personally, and for that purpose to seek him at the place of delivery. He is only relieved from his duty by special contract, or general usage. *id.*
6. The party signing the freight receipt was found not to have any special authority from the company, nor any authority to carry freight to, or deliver it beyond, the city of Albany; but it was proven that he was their general agent, to receive all freights offered, and to sign receipts therefor. And by the pleadings, it was admitted, that the defendants were common carriers of goods as well beyond as to Albany. *Held*, that the company was sufficiently bound by such agent's receipt. *id.*
7. *Held* further, that as it did not appear that the goods were transported even to Albany, that the company would have been in all events responsible for that neglect. *id.*
8. A passenger carrier is, by law, under an obligation to provide for the safe conveyance of passengers, as far as human care and foresight can secure that result. *Weed v. Panama Rail Road Co.*, 193
9. For injuries caused to a passenger by the misconduct of the carrier's agent, in his mode of running the cars and managing the train confided to his care and control, the carrier is liable. *id.*
10. The fact that such misconduct did not result merely from the inattention or misjudgment of the agent, but from a deliberate and conscious disregard of duty, and of his orders, and was, therefore, wilful, does not exempt the carrier from liability to the passenger whom he had undertaken to carry, and who is injured by such misconduct. *id.*

COMPLAINT.

1. When, upon a trial, the sufficiency of a complaint is denied, as not stating

facts constituting a cause of action, the only question is, whether the plaintiff, upon the facts stated, is entitled to the relief which he claims, and it is immaterial, whether that relief be legal or equitable. *General Mutual Insurance Co. v. Benson*, 168

2. If the relief be equitable in its nature, but cannot properly be granted without the presence of other parties, the objection of a defect of parties must be taken by demurrer, or answer; and, if not so taken, it must be held to be waived. *id.*
3. It cannot be taken upon the trial, in the form of an objection to the complaint, as not stating facts sufficient to constitute a cause of action. *id.*

COMPOSITION WITH CREDITORS.

1. A debtor, in failing circumstances, obtained from his creditors a discharge in a composition deed, upon paying twenty-five per cent. of the claims, in endorsed promissory notes. The plaintiffs made it a condition that they should be ultimately paid the remaining seventy-five per cent. A bill of goods was subsequently purchased by the defendant, of the plaintiffs, and for the aggregate amount of such bill, and the balance of the old debt, two notes were given. Each note included part of such old balance. One, however, at 90 days, was for the price of the goods, and \$21.60 of such balance; the other was exclusively for it. This action was on the last note.

An action was brought upon the 90-day note, and judgment taken for want of an answer. The complaint there was simply upon the note in the usual form. *Held*, that supposing the defence would have been available in the former action, yet the judgment there does not preclude the defendant from setting it up here. *Hughes v. Alexander*, 488

2. *Held*, that the condition attached to the agreement for the composition, was against the policy of the law, and void. *id.*

CONDITIONAL SALE.

1. When the owner of a bond and mortgage, made by a third person, applies to another to make a loan on the security thereof, who refuses to do so, but purchases them at less than their face, and takes a transfer which recites a sale, at a sum named, and conveys them in pursuance thereof, the transaction will not be treated as being, in effect, a mortgage, merely because the purchaser gives his covenant to the vendor, to resell them to the latter, within a time named and on conditions specified. *Quirk v. Rodman*, 285
2. In the absence of all evidence of the inadequacy of the consideration paid, and of any personal liability of the vendor to refund, in any event, the money received as the price of the transfer, the covenant will be treated as a conditional sale. *id.*

CONSIDERATION.

See AGREEMENT, 2, 3.
RELEASE

CONSTRUCTION.

Of §§ 227, 463, 464, of Code, see Attachment, 2.
Of the Revised Statute of Promissory Notes and Bills of Exchange, see Bills of Exchange, 32, 33, 42, 43, 44.
Of the Acts of 1848 and 1849, for the better Protection of the Property of Married Women, see Husband and Wife, 10, 11, 12, 13.

CONTEMPT.

See PRACTICE (Contempt).

CORPORATION OF THE CITY OF NEW YORK.

1. A permit was granted to the defendant by the deputy street commissioner, to place bricks on the carriage-way of a street, in front of a building he was erecting. This was dated the 21st of May, 1854. On the 27th of

May, a notice to remove them was posted upon the pile, signed by the defendant, commissioner of streets and lamps.

Held, that, under the ordinances of the corporation, the power to order such a removal of an obstruction was vested in the superintendent of streets, at that time another person. *Naylor v. Glazier*, 161

2. *Held*, that no power is given by the ordinances to the deputy street commissioner to grant a permit, and that a delegation of power by the street commissioner must be proven by writing, or a custom sufficient to show his consent. *id.*

3. There seems a concurrent power exercised by the street commissioner and the superintendent of streets, to order a removal of obstructions, and, by inference, a power to permit its continuance. *id.*

4. *Quere*, Whether the provision of the ordinance of 1845, as to giving notice by putting it upon the thing to be removed, is not now in force. *id.*

COVENANT.

1. An instrument, under seal, was executed, upon a sale made by the plaintiff to the defendants, by which the former sold to the latter all his interest in the manufacture and sale of porcelain teeth in the city of New York, with his stock on hand, and the good-will of the business. The plaintiff covenanted to instruct one of the defendants in the art of manufacturing porcelain and incorruptible teeth, and to furnish him with his recipes therefor. The agreement also contained the following clause: "And the party of the first part will not carry on, or cause to be carried on by any person with whom he shall be interested, the manufacture of porcelain teeth, or impart the knowledge of manufacturing the same to any person, other than as aforesaid."

It was alleged, in the complaint, that the said art of manufacturing porcelain teeth, in which the defendant was to be instructed, was a secret of

the plaintiff, and known to be such by the defendant.

Held, on demurrer, that the covenant in question was valid, and not one in restraint of trade. *Alcock v. Giberton*, 76

2. *Quere*, As to the effect of one covenant, void, as against public policy, being united in the same instrument with a valid covenant? *id.*

D

DAMAGES.

See LANDLORD AND TENANT, 2, 3, 2.

E

ESTOPPEL.

1. *Held*, that the legal owner of the land in question, was not estopped from setting up his title, by having suffered the erection of a wall of a new building, upon the space in question, in the manner stated in the case. His non-interference might excuse a trespass, but could not operate to divest and transfer a title.

2. The cases, upon the doctrine of estoppel, referred to; and the distinction shown between what shall take effect as a license, or take away the character of a trespass, and what shall defeat an estate.

3. *Held*, that merely standing by and suffering another to erect a building, or wall, on land, is not effectual, in a court of law, to give a title. That a court of equity may, sometimes, in cases of this nature, be applied to, to protect an innocent party, who has been misled, and expended his money, in consequence of the acts or representations of the owner, when the case amounted to a fraud. *Miller v. Platt*, 272

EVIDENCE

1. In an action to recover damages for injuries to the person occasioned by the negligence of the defendant, the burden of proving that there was a want of ordinary care on the part of the person injured, which contributed directly to the accident, rests upon the defendant. The plaintiff, in order to maintain the action, is not bound to prove a negative by showing affirmatively that there was no such want of ordinary care. *Johnson v. Hudson River Railroad Co.*, 21
2. No exception, not established by precedents that the court is bound to follow, ought to be admitted from the general rule, which casts the burden of proof upon the party holding the affirmative. *id.*
3. Whether the evidence on the part of the plaintiff justifies the inference that the negligence of the person injured contributed to the accident, is a question for the determination of the jury. *id.*
4. Proof of a local usage cannot be received to vary the legal construction of a contract, unless it is clearly proved that its existence and terms were known to the parties, and that it was in reference to it that their contract was made. *Whesler v. Newbould*, 29
5. Evidence was allowed at the trial, of imposition and fraudulent statements, made by the defendants to other persons, during the period of making the loans in question.
Held, that had the question here been as to fraud in procuring the loans, such evidence was plainly admissible. *French v. White*, 254
6. *Held*, further, that as evidence of this fraud was allowable, to show an original and continued scheme to defraud, testimony as to cotemporaneous frauds of the same character, practiced upon others, was also admissible. *id.*
7. When a plaintiff, in an action against a firm, in order to prove that the endorsement of its name was written by one of its members, reads a portion of one of the firm's answer, which states such to be the fact, but also alleges other facts, which, if true, would be a defence to the partner whose answer is so read, the latter is entitled to have the other parts of the answer, which present such defence, read as evidence in his own behalf. *Gildersleeve v. Mahony*, 383
8. But although the Judge, at the trial, rules the contrary, a new trial will not be granted for that reason, if the plaintiff subsequently proves, by clear and uncontradicted evidence, facts which would render such defence wholly unavailing. *id.*
9. In such a case, the court can see that the error could not, possibly, have prejudiced the defendant. *id.*
10. Declarations of a defendant, not made to the plaintiff, are not evidence for the defendant, and declarations of the plaintiff's agent, who negotiated the contract, made subsequent to the transactions to which they related, and not forming part of the *res gesta*, are not admissible against the plaintiff on the trial of such an issue. *Isles v. Tucker*, 393
11. In an action, by a vendee of personal property, against the sheriff, who has taken the property under execution against the vendor, it is sufficient for the plaintiff to prove his purchase, the payment of the consideration, delivery to him, and his actual and continued possession down to the time of the levy. He is not bound to go further, and prove affirmatively that the sale was made in good faith, and without an intent to defraud creditors of the vendor. *Salmon v. Orser*, 511
12. The defendant, in such case, if he defend on an allegation of a fraudulent sale, has the burden of proof. *id.*
13. It is where the possession is not changed, or, if the vendee has taken possession, where the vendee's possession has not been continued, that the statute casts upon him the burden of showing that the sale was in good faith, and without any intent to defraud, &c. *id.*
14. Declarations of the vendor, made to

his wife prior to the sale, and forming no part of the negotiations with the vendee, are not competent evidence to show, in favor of such vendee, that the intention of the vendor was not fraudulent. *id.*

15. Evidence to prove that the acceptance of a bill of exchange was obtained by a false representation of existing facts is admissible, although not accompanied by an offer to prove that the misrepresentation was known to the holder. It is sufficient to cast upon the holder the burden of proving a valuable consideration. *New York and Virginia State Stock Bank v. Gibson*, 574

See **BILLS OF EXCHANGE**, 24, 25.
ESTOPPEL.
LANDLORD AND TENANT, 10.
MORTGAGE.
NEGLIGENCE, 3.

EXCEPTIONS.

1. An exception, in the following terms, to the charge of the court, "The defendant's counsel excepted," is too general, and cannot be regarded as an exception. *French v. White*, 254
2. It is not an error to which an exception will lie, that the Judge submits the very question in issue to the jury, although the matter of defence is sworn to by one witness, and he is not contradicted. A verdict for the plaintiff may, in such case, be against evidence, but the defendants should seek relief by motion for a new trial, and not by exception and appeal from the judgment. So the defendants might have required suitable instructions regarding the force and effect of the evidence. *Stettiner v. Granite Ins. Co.*, 594

EXECUTION.

See **PRACTICE (Execution)**.

F

FALSE IMPRISONMENT.

1. A mortgagee of chattels, having seized them for satisfaction of his demand, the parties in possession claiming under the mortgagor, executed an instrument by which they agreed to return and deliver the goods to him, on demand, or to pay the sum of \$871.38 claimed to be due. An assignee of the mortgagee recovered against the parties the sum of \$500, and costs, in a suit upon this instrument. After execution against the property unsatisfied, an execution against the persons of the defendants was issued, under which one of them, the present plaintiff, was arrested, and gave bail for the limits. At the end of about nine days, he was discharged, and his bond cancelled, on the ground that the judgment did not warrant the arrest.

Held, in an action of false imprisonment brought against the plaintiff in such former suit, and his attorney, that each was responsible to the plaintiff for damages. *Sleight v. Leavenworth*, 122

2. To a complaint which charges that the defendant, without cause, caused the plaintiff to be arrested and sent to prison, and detained there until the enforced payment of a sum for his deliverance, an answer which states, in proper form, that the plaintiff was brought before the defendant charged with an offence which the defendant had jurisdiction to try and decide, a trial, according to law, and a decision which he was competent to make, and the issuing of process to enforce it, and that the imprisonment was by virtue thereof, and in execution of such decision, is sufficient. *Willis v. Havemeyer*, 447
3. A reply, which does not controvert any of the alleged facts requisite to confer jurisdiction on the defendant to hear and determine such offence, or the fact of making the decision and issuing of the process set out in the answer was demurrable (in Jan. 7, 1851) for insufficiency. *id.*
4. When not required by statute, it is not necessary to the protection of an

officer of special jurisdiction, that a formal record of his decision should be made and filed. It is enough that his decision was reduced to writing at the time it was made. *id.*

5. When a statute confers authority on such an officer to try a specified class of offences, and punish by fine or imprisonment, it necessarily confers authority to issue process to enforce his judgment. *id.*
6. A reply to such an answer, alleging matters which, if true, would show the decision to be merely erroneous, and not void, is insufficient. While unreversed it will protect the officer making it. *id.*

FRAUDS.

1. A purchase of property, at an auction sale, made by the owner of it, at his residence, is not necessarily fraudulent and void, as against a subsequent *bona fide* purchaser of such property from the same owner, while it continues in his actual possession, merely because the first purchaser did not take an immediate delivery of it, and retain a continued and actual change of possession. *Brown v. Wilmerding*, 220
2. The question, in such a case, is one of actual intent. And if a jury find, upon sufficient evidence, that the first sale and purchase were made in good faith, and without any intent to hinder, delay, or defraud the creditors of the vendor, or those subsequently purchasing from him, the verdict will not be disturbed. *id.*

FREIGHT.

1. Molasses was shipped, under an ordinary bill of lading, expressing that six hundred and twenty-four barrels of molasses, marked, &c., "were shipped in good order and condition, to be delivered in like good order and condition in New York," freight payable "for the said molasses at the rate of three and a half cents per gallon, gross gauge." At the foot of the bill of

lading were the words, "Contents and gauge unknown."

The vessel sailed, with the six hundred and twenty-four barrels of molasses on board. Eight of them were delivered empty, not containing any molasses.

It was stated, as part of the case, "that all the said barrels of molasses were well and properly stowed, and none of the molasses in the said eight barrels was lost by the perils of the sea, nor by any negligence or want of care on the part of the owners of the vessel, their agents, or servants; but whatever molasses was lost from the said eight barrels, which were empty at the time of the delivery thereof, was wasted or lost solely by, or in consequence of, leakage, fermentation, or inherent waste."

In an action for the freight of these eight barrels, by the ship owners,—

Held, that the plaintiffs were entitled to recover. *Nelson v. Stephenson*, 539

2. That the owner of liquids, or of any articles shipped in casks of any description, is, in the first instance, charged with the duty of supplying proper ones, and would be presumptively responsible for a loss arising from their insufficiency or defects. *id.*
3. That the effect of an unqualified bill of lading is to transfer this presumptive responsibility to the captain and owners of the vessel. *id.*
4. When the case presents no other facts, if the casks be delivered empty or nearly so, and the actual cause of the loss or diminution be unknown or conjectural, the owners of the vessel lose their freight. A proportion of the freight would also be lost for any number of the casks delivered empty, as well as for any portion of the contents of any cask leaked out. The loss, in such cases, is legally attributable to the defect of stowage, or to some cause over which the master had control, and for which he has engaged to be responsible. *id.*
5. As, however, a bill of lading, treated as a receipt, is not conclusive, it is open to the ship owner and master to prove explicitly that the casks were in fact unsound, or badly made; and in such a case the original responsibility

of the owner for their condition is restored, and he is bound to pay the freight. *id.*

6. A bill of lading may be so qualified as to avoid any acknowledgment of the good order of the casks, or the quality or quantity of the contents. The doctrine of the French law stated upon this point. *id.*

7. The phrase "contents unknown," in this case, should not be interpreted as negating the admission that the casks contained molasses; but only negating an admission of the quantity or quality of the article. *id.*

G

GENERAL AVERAGE.

1. A vessel, bound from New Orleans to Havre, was struck by lightning and set on fire. Her cargo consisted of cotton chiefly, some staves, and eight kegs of specie. A passing Danish brig was induced to stay by her, while efforts were made to put out the fire. Holes were cut in the deck, and water poured down, but ineffectually, and they were stopped to stifle the flames. The next day, it was found necessary to put into a port of distress, and the brig was engaged to accompany her, and the passengers and specie were removed to the brig. No bargain was made as to compensation. The two vessels arrived at Charleston, when the fire engines of the city were employed. The vessel was filled with water and sunk to the upper deck. After that, she was pumped out, and the cargo discharged. The captain, without advice, abandoned the voyage, and sold the cotton at Charleston. He made some slight repairs to the vessel, by his own carpenter there, and brought her to New York, where repairs to a large amount were put upon her.

While in the harbor of Charleston, and before reaching the wharf, the captain obtained the specie from the Danish brig, and deposited it in a bank.

Certain sums were allowed to the captain of the Danish vessel, and to the fire-

companies, under the sanction of the Chamber of Commerce in Charleston.

Upon revising an adjustment of the general average, made in New York—

Held, 1st. That the specie on board the Galena, and which was transferred to the Danish brig, was liable to contribute, in common with any other portion of the cargo, to whatever may be a proper subject of general average.

2d. That the amount awarded to the Danish brig, for her services in going into Charleston with the Galena, was to be allowed.

3d. The amount awarded by the Chamber of Commerce to the fire-engine company was also proper.

4th. The damage to the vessel, occasioned by cutting the holes in the deck, when at sea, to pour down the water—that is, the mere expense of repairing the deck where these holes were cut, was to be allowed as a proper item for contribution.

5th. The damage caused to the vessel by the swelling of the cargo—that is, the amount which can be distinctly shown it would cost to repair that specific damage, was also proper.

6th. That any loss to the cargo, which it can be distinctly shown arose, exclusively, from damage done by the water, the cargo not being on fire at the time, was to be allowed.

7th. The freight was improperly allowed by the adjusters. It is neither to be contributed for, nor to contribute.

8th. As to the disbursements in Charleston, if any expenses were incurred by landing part of the cargo, in order to pump out the vessel, they may be allowed; and so any expenses attending loading, storing, &c., incurred prior to the determination to abandon the voyage.

9th. Only that part of the cargo should be contributed for, which can be shown to have been damaged, exclusively, by the water. The rest of the cargo is to be assumed to have been damaged by the fire, if not proven to have been damaged by the water, and is not to be allowed for.

10th. The cargo is to contribute in the usual manner, including the amount allowed in general average.

11th. That, as to the repairs in New York, a selection of the items must be made; or, if that is impossible, an es-

timate of the cost of repairing that damage to the vessel, which arose from the swelling of the cargo from the water poured down. The sum which it would have cost to do this, without any other repair whatever, is to be allowed, and that only. *Nelson v. Belmont*, 310

2. On the night of the 26th December, 1853, the sails, masts and spars of the ship "The Great Republic," then lying at a wharf in the port of New York, accidentally caught fire, and such was the progress of the flames that their destruction was certain, and from the frequent falls on the deck of fragments and flakes of fire, the firemen refused to go on board. The masts, &c., were accordingly cut away, but a spar, which was on fire, in falling, pierced the decks, and set on fire both ship and cargo, in the hold and between-decks.

Duer and Hoffman, J. J., differed on the question, whether the cutting away of the masts, &c., was a voluntary sacrifice, creating a loss to be contributed for in a general average. *Campbell, J.*, declined to express an opinion upon the question. *Lee v. Grinnell*, 400

3. *Held*, however, by all the Judges, that as the effect of the cutting away of the masts, &c., was not to preserve any of the property at risk, for any period of time, from the peril in which it was involved, no loss, either to the ship or cargo, that was caused by the fire alone, was to be contributed for in the settlement of a general average. *id.*

4. As the progress of the fire could not, by any other means, be stopped, the ship was scuttled, and sunk ten feet, until she struck bottom. She continued to burn above, and was burnt to the water's edge. It was proved, that both the ship, and large portions of the cargo, sustained damage from the scuttling, that otherwise might not have been incurred.

Held, that the scuttling was a voluntary act, and the losses that resulted, proper subjects for contribution, and, consequently, that every loss to ship or cargo that could be distinctly traced to the scuttling, as its proximate cause, was to be contributed for in the new ad-

justment of the general average ordered by the court. *id.*

5. By the agreement of all the parties interested, both ship and cargo, in their damaged state, were placed in the hands of the defendants, and were sold at public auction, and questions arose as to the interests bound to contribute, in the adjustment of a general average, and the value upon which each ought to contribute.

Held, that under the special circumstances of the case, the actual proceeds of the sale, deducting all necessary and proper charges, must be adopted as the contributory value of each interest, with the addition of the sum that each would be entitled to receive in contribution from the others. *id.*

6. *Held*, that as the voyage was not commenced, and the loss of freight could not be attributed to the circumstances creating the general average, the freight was neither to contribute nor be contributed for. *id.*

H

HUSBAND AND WIFE

1. Although a summons and complaint ask the recovery of a sum of money from the defendants generally, yet if the case made shows a demand binding merely the separate estate of a married woman, the cause is of an equitable nature, and should be tried at Special Term without a jury. *Chesborough v. House*, 125

2. The complaint alleged that the defendant, the wife, was to take the furniture, the subject of the suit, in her own name, and pay for it out of her own funds. The defendants, answering jointly and severally, averred that the wife was solely interested; that the money paid was paid out of her separate estate, and that she had separate estate to the amount of \$6,000. The written agreement, upon which the action chiefly rested, was signed by Smith and Caroline E. House, and the property was transferred to her,

- and she covenanted to pay the stipulated price in the manner therein stated.
- Held*, that her separate estate was bound, and judgment given for the recovery of the demand out of it. *id.*
3. The case distinguished from that of *Switzer v. Valentine*, (4 Duer, 98.) *id.*
4. In a joint action by husband and wife for the recovery of land, no separate judgment can be given in favor of the wife and against the husband. They must recover jointly, or not at all. *Bartow v. Draper*, 180
5. Hence, there can be no recovery when it appears that the husband has debarred himself by his voluntary acts, from claiming the possession during his own life, when he is tenant by the courtesy, or when he is not, during the joint lives of himself and wife. *id.*
6. The act of the legislature of 1848, giving to every female who might thereafter marry, all the real and personal estate owned by her at the time of the marriage, as her sole and separate property, did not operate as a repeal of the common-law rule, making the husband liable for all the debts of the wife, contracted by her before the marriage. *Berley v. Rampacher*, 183
7. A statute is never construed as abolishing or modifying a rule of the common law, unless by express words, or necessary implication. The rule, if not plainly inconsistent with the statute, remains in force. *id.*
8. The act of 1853, exempting the husband from his common-law liability, ought not to be construed as affecting the vested rights of creditors. So construed, it would be unconstitutional and void. *id.*
9. *Held*, therefore, that the remedy of the plaintiff was not limited to the separate estate of the wife, but that he was entitled to a common-law judgment against both defendants. *id.*
10. Before the acts of 1848 and 1849, "For the better protection of the property of married women," a married woman, even when her property was settled to her separate use, could not carry on any trade or business separately from her husband, and hold the earnings of it, secure from the claims of his creditors, unless by his assent and agreement, given either before marriage, and in consideration of it, or, subsequently, upon a new and valuable consideration. *Freeman v. Orser*, 476
11. Although the acts of 1848-9 have dispensed with the necessity of trustees to protect the wife's separate property, whether owned by her at the time of the marriage, or subsequently acquired, against the claims of her husband's creditors, they have not given to her any right to deal with such property in the way of trade, as a *feme sole*, without the agreement or assent of her husband. *id.*
12. The acts in question do not contemplate the case of a married woman carrying on trade in her own name and right as a *feme sole*. Had the legislature intended to confer this right, language expressing that intention would have been used. *id.*
13. Such an intention cannot be implied, unless the implication be necessary, since the statutes are an alteration of the common law, in derogation of the marital rights of the husband. That the implication is not necessary is certain, since, without it, full effect may be given to every word that the statutes contain. *id.*
14. It is a necessary conclusion, that a married woman having separate property, has no right to invest it in a trade carried on by her in her own name, so as to hold the accretions and profits resulting from the business protected from the claims and interference of the creditors of the husband. *id.*
15. To enable her to do this, the assent of the husband, founded on a valuable consideration, is just as indispensable as before the acts of 1848 and 1849 were passed. *id.*
16. The time, services, talents, and industry of the wife, belong to the husband, and are valuable in themselves.

He has, therefore, as against his creditors, no more right to part with them, without a valuable consideration, than to make a voluntary settlement of any other property belonging to him in fraud of his creditors. *id.*

17. There being no evidence, in the case before the court, of any valid assent by the husband, to a millinery trade carried on by the wife, and it appearing that the earnings and profits, as well as her separate capital, were invested in the stock on hand, and there being no means by which they could be discriminated,

Held, that the whole was rightfully levied on, under an execution against the property of the husband. *id.*

I

INFANTS.

1. Where a person hires a horse to go a fixed distance, and goes beyond it, the act is, in judgment of law, a dispossession of the owner, and a conversion of the property to his own use. *Fish v. Ferris*, 49
2. Hence, when an action for damages is brought by the owner, as it is founded, not upon a breach of the contract of hiring, but upon the unlawful conversion, infancy is no defence. *id.*

INSURANCE—FIRE.

1. The insurable interest of a mortgagee in the property mortgaged corresponds in its amount with that of the debt, which the mortgage secures. *Kernochan v. New York Bowery Fire Insurance Co.*, 1
2. Hence, in the event of a total loss, he is entitled to recover the whole sum insured, provided it does not exceed that which at the time of the loss was due upon the mortgage. Evidence cannot be admitted to defeat or diminish his recovery by showing that the mortgaged premises, notwithstanding

the loss, continued to be a full security for the debt. *id.*

3. Nor by this construction, does an insurance by a mortgagee lose its character as a contract of indemnity, since he can never recover from the mortgagor for his own benefit the sum paid to him by the insurers. The insurers will either be subrogated to his rights and remedies under the mortgage, or the sum received from them will be applied to the satisfaction of the mortgage debt. *id.*

4. When an insurance is made by a mortgagee as such, it is reasonable to believe that the insurers, looking to a transfer to themselves of the mortgage securities in the event of a loss, will charge a lower premium than would be charged to an absolute owner. Hence, if the assured has placed it out of his power to make this transfer, the fact, as material to a proper estimate of the risk, as a general rule, ought to be disclosed when the insurance is effected. *id.*

5. An assignee, for the benefit of creditors, to whom, among other property, a policy of insurance was assigned, after a fire had occurred, may sue in his own name, without those provided for by the assignment being made parties, to recover the loss. *Mellen v. Hamilton Fire Ins. Co.*, 101

6. An assignment of this character is not within the meaning of the clause in policies, requiring the written consent of the assurers, to an assignment. It is merely the transfer of a debt. *id.*

7. An insurance was effected, by the plaintiff's assignor, with the defendants, on the 12th of April, 1854. On the 23d of June, 1854, he effected another insurance, with another company. The fire took place on the 13th of July, 1854, and the preliminary proofs were furnished on the 26th of that month. No notice of such further insurance was given to the company, until that time, and accompanying such proofs. *Held*, that this was not a compliance with the provision of the policy, requiring the assured to give notice to the company, with all reasonable dili-

gence, of any further insurance that might be effected by him; and the policy was made void by such neglect.

id.

8. The knowledge of such other policy by an insurance broker, who procured the policy, for the plaintiff's assignor, with the defendants, is not the knowledge of the company, to bind them. There was no proof of his being such a general agent as would make the company responsible for his acts or knowledge.

id.

9. Where a mortgagor effects an insurance upon his house, and, as a security to the mortgagee thereof, procured a policy from the defendants, providing, in terms, that the loss, if any, should be payable to the plaintiff, as such mortgagee, a subsequent act of the mortgagor, though in violation of the conditions of the policy, will not defeat the right of the plaintiff to recover, if a loss occurs.—*WOODBURY, J. Grosvenor v. Atlantic Fire Ins. Co.* 517

10. The insertion, in the policy, of the words, "loss, if any, payable to S. G., mortgagee," operates to give the mortgagee an interest in the policy, and to invest him with the same rights which he would have, if, without such words in the body of the policy, the mortgagor had assigned to him the policy, with the express consent of the insurer.—*WOODBURY, J.* *id.*

11. It is settled law, in this state, that an assignment of a policy, by the assured to his mortgagee, with the express consent of the insurers, will enable the mortgagee to recover, in case of loss, although the assured may have done acts, which, by the terms of the policy, render it void.—*BOSWORTH, J.* *id.*

12. A policy which, by its terms, declares that the loss, if any, shall be payable to the mortgagee, is an equally effective protection of his interests. Whatever effect may be given, justly, by the courts to the former should also be given to the latter transaction. By each, the loss, if any, by the express consent of the insurer, is made payable to the mortgagee. The fact of such consent, in whichever form expressed, must be presumed to have been sought,

and given, with the intent, and for the purpose, of securing the mortgagee, as well in the one case as in the other, and to the same extent in each.—*BOSWORTH, J.* *id.*

13. Where a statement of the amount of the loss in the preliminary proofs was definite, sworn to, certified by two appraisers, but had not the certificate of a magistrate as to the fire, the insurers cannot avail themselves of the defect, for the first time, at the trial. *Bilbrough v. Metropolis Ins. Co.*, 587

14. A proposition to another company, containing certain representations was found, upon the evidence, to have been made part of the application to the defendants, and to have entered into the contract between these parties.

In that proposition the plaintiff answered an interrogation as follows: "During what hours is the factory worked?" "We run the cards, pickers, drawing frames and speeders day and night; the rest only twelve hours daily. We only intend running nights until we get more cards, &c., which are making. We shall not run nights over four months."

Held, that the statement of an intention to cease running upon receiving the cards, then being made, was equivalent to an agreement to cease upon that event. The subsequent clause was an absolute limitation of the time during which they should be at liberty to run at night. *id.*

15. The doctrine of "a promissory representation," and the case of *Murdock v. The Chenango Mutual Ins. Company* examined. *id.*

16. *Held*, that language in a policy which imports that the assured intend to do, or not to do, an act which materially affects the risk, its extent, or nature, involves an engagement to perform or omit such act. If the assured would reserve a right to change such intention, he must employ explicit language to denote the reservation. *id.*

17. The terms here used established a positive engagement. *id.*

18. A condition in a policy of insurance upon goods "contained in the brick

building situated," &c., by which, "lighting the premises insured, by camphene or spirit-gas without written permission in the policy, shall render it void," is a condition binding upon the assured, and operated to restrain the use of camphene or spirit-gas as a means of light in and about the goods at the place designated. *Stettiner v. Granite Ins. Co.*, 594

19. A condition in those terms should not be rejected as inoperative, because "lighting the premises insured" is an inapt expression, where goods are the subject of the insurance. *id*

20. Nor should they be rejected because this form of expression is more appropriate when the premises insured are a building, &c. *id*

INSURANCE, MARINE

1. When a vessel, disabled by the perils of the sea, is in a port of necessity, and it is ascertained that the costs of repairing, making the usual deduction, will exceed a moiety of her value, there is a constructive total loss, and the owner, if insured, by abandoning in due season, may demand its payment. The right to abandon, is, in this case, unqualified and absolute. *Ruckman v. Merchants' Louisville Ins. Co.*, 342

2. But the right to abandon a vessel, thus disabled, is not confined to this case; for, although the estimated cost of her repairs may be less than half her value, yet if, by the exercise of that diligence which the master and other agents of the owner are bound to use, she cannot be placed in a condition to perform her voyage, there is a constructive total loss, and a consequent right to abandon, and claim its payment. *id*

3. Whether the impossibility, of putting the vessel in a condition to resume her voyage, arises from the want of necessary materials, or workmen, or of the necessary funds, is immaterial; where the impossibility is proved, the right to abandon equally attaches. *id*

4. The doctrine, that the want of the nec-

essary funds, or credit, must be attributed to the negligence of the owner, and is, therefore, not a valid cause of abandonment, is confined to the cases in which the vessel is in a port of destination. *id*

5. The owner is not bound to provide the master with funds or credits sufficient to meet the cost of repairs, when less than a moiety, in whatever port the vessel, by the perils of the voyage, may be driven. *id*

6. But the right to abandon, when founded on the inability of the master to procure the necessary means for repairing the vessel, is not, as when founded on the ascertained cost of repairs, unqualified and absolute. It depends upon the special circumstances of each case in which the question arises. *id*

7. When the master has not the necessary funds, and cannot raise them upon the credit of his owner or his own, it is his duty to raise them upon the security of the property in his charge—vessel, freight, or cargo. *id*

8. Nor are the diligence and efforts of the master, to procure the necessary means for repairing the vessel, to be confined to the port of necessity in which the vessel happens to be. *id*

9. When it appears that without any prejudicial delay, or an increase of expenses beyond a moiety, the want of materials or workmen could have been supplied from a neighboring port, or the necessary funds have been obtained by a communication with his owner or consignee, the breaking up of the voyage by the master will be deemed an unjustifiable act, and a bar to the recovery of a total loss. *id*

10. The mere retardation of the voyage, for the purpose of making or procuring the means of making necessary repairs, is not a valid ground of abandonment; nor that, from the sale or damaged condition of the cargo, the voyage had ceased to be worth pursuing. *id*

11. Nor does the sale of the vessel, unless it is an act of barratry, or is justified by a necessity arising from the perils insured against, create a total loss. *id*

12. The true test of the right to abandon, in all cases where the vessel has been rendered innavigable by the perils insured against, except when the ascertained cost of repairs exceeds a moiety, is to be found in a proper answer to the question, Whether a prudent owner, if on the spot and uninsured, in the exercise of a sound judgment, would have broken up the voyage or have elected to repair? and it is upon this question that, in all such cases, the cause should be submitted to the jury. *id.*

13. Where the cargo is sold to defray the costs of repairs, it is not a loss from the perils insured against, for which the insurers are liable. *id.*

14. A total loss of freight, resulting from such a sale, is not recoverable. *id.*

J

JURISDICTION.

See FALSE IMPRISONMENT.

L

LANDLORD AND TENANT

1. When a tenant is evicted before the expiration of his lease, he is thereby absolved from all liability to pay rent from the commencement of the quarter in which the eviction occurred. He may also recover the difference between the value of his lease for the unexpired term, and the stipulated rent. *Chatterton v. Fox*, 64

2. If evicted at a season of the year when the expense of removing is greater than it would have been at the expiration of the term, he may recover such extra expense. *id.*

3. But he cannot recover, as a matter of course, any increased rent which he may be compelled to pay for other premises which he may hire for the purposes of the business for which he

was using the premises from which he was evicted. *id.*

4. A landlord, in whom the reversion in fee is vested, may bring an action against the tenant during the term, for an injury committed by the tenant to the freehold. *Ray v. Ayers*, 494

5. A lease contained a clause to the effect, that, if the yearly rent, or any part thereof, should remain unpaid, on any day of payment, for the space of fifteen days, or if default should be made, in the performance of any of the covenants contained therein, it should be lawful for the lessor to re-enter, and to remove all persons therefrom.

Held, that an action to recover possession could be maintained, without giving the fifteen days' notice, prescribed by the statute in certain cases. *Keeler v. Davis*, 507

6. The receipt of rent, by a landlord, after the breach of a covenant in a lease, creating a forfeiture, does not operate as a waiver of the forfeiture, unless his knowledge of the breach, when he received the rent, is clearly proved; and, upon that question, a verdict of the jury in his favor, unless plainly against evidence, is conclusive. *id.*

7. When a person is in the quiet and peaceable possession of premises, with the knowledge and acquiescence of the owner, for upwards of a month, and has taken such possession under a purchase from one who claims to have a parol lease from such owner, and was in actual possession for two months, he is to be deemed rightfully in possession, so far as to entitle him to occupy till the 1st of May then next, or, at least, until the tenancy be terminated by notice. The owner may not forcibly eject him, and defend the act by showing that such alleged parol lease was not binding upon him. *Marquart v. La Farge*, 559

8. Still less was the owner justified in closing the entrance, and refusing to permit such tenant to remove his goods. *id.*

9. In an action for damages, in such case,

the owner is liable for the value of the goods detained, and for the injury done by breaking up the business of the tenant, who kept a refreshment saloon within the purlieus of a theatre. *id.*

10. In such case it is not erroneous to allow evidence that "the plaintiff did a pretty large business"—that "the business was good and profitable," and that "one half the receipts were clear profit," to be given to the jury, among other testimony, to aid them in fixing the amount of damages. *Marquart v. La Farge*, 559

LEASE

See LANDLORD AND TENANT.

M

MALICIOUS PROSECUTION.

1. To maintain an action for malicious prosecution, three facts, if controverted, must be established:
 - 1st. That such prosecution was determined in favor of the plaintiff, before the action was commenced.
 - 2d. The want of probable cause.
 - 3d. Malice. *Vanderbilt v. Mathis*, 304
2. The determination, in favor of the plaintiff, of the prosecution alleged to be malicious, is not, *per se*, *prima facie* evidence of the want of probable cause. *id.*
3. The proof of malice is as essential as that of the want of probable cause. But the latter may be shown, without the existence of malice being either a consequence or concomitant. Malice, in fact, must be proved, either by direct evidence, or by circumstances connected with, or growing out of, the proof of a want of probable cause, justifying the inference of it, as a fact thus proved. *id.*
4. There is no theoretical malice, which can satisfy the rule requiring proof of malice, and which can coexist with the established fact, that the prosecution

was instituted in an honest belief of the plaintiff's guilt, and with no other motives than to bring a supposed offender to justice. *id.*

5. The question of actual malice may be a turning point in an action of this nature. *id.*
6. In such a case, it must be determined by the jury, as a question of fact, and such evidence of its existence must be given as will justify a jury in finding it, as a fact proved. *id.*

MORTGAGE

1. In a suit brought to foreclose a mortgage given to secure the payment of a bond conditioned for the payment of a sum of money on a specified day, parol evidence is inadmissible to show that at the time of the delivery of the bond and mortgage there was a verbal agreement that the money should not be due until a later day. *Hunt v. Bloomer*, 202
2. The bond was payable on the 17th day of May, 1855, with interest, payable half-yearly, and the money loaned by the plaintiff was advanced on the 22d of May, 1854, and it was conceded, that on the 17th of May, 1855, full six months' interest was paid. In such case, it will be presumed that a proper adjustment was made, on the payment of the interest for the first six months, (in August, 1854,) by an allowance for the five days, and in the absence of any proof in relation to such previous payment, the court will not presume that the interest paid on the 17th of May, 1855, was more than was then due. *id.*

See INSURANCE, FIRE.

MORTGAGE, CHATTEL.

1. The provisions in the Revised Statutes, relative to chattel mortgages, have no application to a mortgage, executed in a British province, upon a British vessel. It is by the rules of the common law that the validity of such a mortgage must be determined. *Fairbanks v. Bloomfield*, 434

2. At common law, the continuance in possession of a mortgagor of chattels is not *per se* evidence of a fraudulent intent, rendering the mortgage void, as against creditors and purchasers. *id.*
 3. It is no objection to the validity of a mortgage, that it is given to cover future advances, as well as a present debt. *id.*
 4. It is now settled law, that a mortgage of chattels is not rendered void, as against creditors, by a provision that the mortgagor shall retain the possession for a definite period. *id.*
 5. Such a provision gives to the mortgagor a legal and exclusive right of possession, during the period so limited. *id.*
 6. As the mortgagee, in this case, has no immediate right to the possession, his omission to take it is not even presumptive evidence of an intent to defraud creditors. *id.*
 7. The possessory right of a mortgagor, by force of such a provision in the mortgage, is a proper subject of a levy and seizure, under an attachment as well as under an execution. *id.*
 8. But if this possessory right is determined while the property mortgaged is still in the hands of the attaching officer, as the title of the mortgagee thereby becomes absolute, he has an immediate right, as owner, to claim the delivery of the property, and its further detention, under the attachment, is then an unlawful conversion. *id.*
 9. When the attaching creditor is the sole plaintiff, in the suit in which the attachment is issued, and, as such, is alone entitled to the benefit of the process, he is bound to comply with the demand of a mortgagee, who has become the absolute owner, for the delivery of the property, by directing that delivery to be made by the attaching officer. In such a case, he has the same power to release the property from an attachment, by such a direction, that he would have to release it from an execution; and by his refusal to give the direction, he renders himself liable for the value of the property. *id.*
 10. The delivery, to which the mortgagee, as owner, is entitled, is unconditional, and he is under no obligation to pay, or tender payment of the costs and expenses of the attachment. *id.*
 11. Goods, exempt by law from an execution, were seized by the sheriff, under a *f. fa.* At that time, they were covered by a mortgage, payable on demand, and containing a clause, that until default in the payment, the mortgagor should remain in possession of the property. In an action against the sheriff, he set up, that the title was out of the plaintiff, and in the mortgagee. *Held*, that until demand and failure, at least, if not until possession, the mortgagor had a leviable interest, the subject of execution and sale. *Held*, that, as between the mortgagor and sheriff, the property must be taken at its full value, without regard to the amount of the mortgage. *Held*, that the case does not differ in principle, from that where the mortgagor is allowed to retain possession until a debt, payable at a definite time, becomes due. *Livor v. Orser*, 501
- The steamboat *Alida* had been mortgaged, by successive mortgages, to four different parties, defendants in this case. Executions, upon judgments obtained in courts of this state, had been levied upon her; and, also, attachments issued from tribunals of the state. She was subject, also, to several admiralty liens, on which libels had been filed; and the marshal of the United States had seized her, and was advertising her for sale. The same had been done by some of the mortgagees, and by the sheriff. The marshal had taken possession under process from the District Court, before the present suit was commenced.
- Upon an application for a receiver,
12. *Held*, that this court, in an action by a subsequent mortgagee of the *Alida*, could make no order which would interfere with the rights of the libellants in admiralty, who had first sued. *Thompson v. Van Vechten*, 618
 13. That this court would not attempt to

interfere, through a receiver or otherwise, with the possession of the marshal, taken under admiralty process.
id.

14. That this court would not interfere to prevent any of the parties enforcing their claims in the District Court of the United States, much less to interpose any obstructions to any exercise of jurisdiction by that court. *id.*

15. *Held*, also, in consideration of the rules appearing to prevail in admiralty, that it was lawful and promotive of justice, to appoint a receiver of the rights and interests of all the parties who had not filed libels, in order that such rights and interests might be represented by one person in such court, to whom any surplus or remnants might be paid, if such court should see fit, and to be disposed of in the present suit in this court. *id.*

16. When a complaint, filed by a mortgagor, to set aside a mortgage, has been dismissed upon pleadings and proof, he is estopped from disputing its validity in a suit against him for its foreclosure. *Hamilton Building Association v. Reynolds*, 671

17. A mortgage to a building association in the usual form, is a valid security only for the monthly payments stipulated to be made, not for fines and other dues. *id.*

18. A provision, in a mortgage given by defendant to the plaintiff, to secure certain monthly payments to be made by him, as a member of the association, to the effect that, if default should be made "in the said monthly payments for the space of six months after they, or any of them, should become due," it should be lawful for the association to advertise and sell the mortgaged premises at public auction, according to the statute, is equally a bar to an action brought within the six months to foreclose the mortgage, as to a proceeding under the statute. *Second American Building Association v. Platt*, 675

N

NEGLIGENCE.

1. The rule that a servant or agent cannot sustain an action against his employer for an injury sustained by reason of the negligence of another servant or agent in the common employment, does not apply to the case of a day laborer, whose contract is only from day to day, and who, by arrangement of the company, is carried to and from his work. *Russell v. Hudson River R. R. Co.*, 39

2. In such a case, if an injury occurs from the exclusive fault of an engineer of the train to such a laborer on his passage from his work, the company will be liable. The laborer is not then in the discharge of any service which his contract with the employer imposes upon him. *id.*

Quere, if the rule is applicable where the employment of the injured servant is wholly distinct from that of the one doing or causing the injury. *id.*

3. In an action against a city municipal incorporation, to recover damages, sustained in consequence of a grating over an area in a sidewalk being in a defective or unsafe condition, it is not enough to entitle the plaintiff to recover, to prove that the covering was insecurely fastened at the time of the accident, and that by reason thereof, and without fault on his part, he was injured. Notice to the defendant of the defect, or negligence of duty, in not ascertaining, and remedying it, must be shown. *McGinity v. Mayor of New York*, 674

P

PARTIES.

See PRACTICE
PARTIES.

PARTNERSHIP.

See AGREEMENT, 4, 5.

PARTY-WALL.

1. When the owners of adjoining lots, by agreement, construct a wall partly on each lot, for the common support of their buildings, the wall so constructed, if used as such for twenty years, is a party-wall, in the legal sense of the term, and the owner of each house has an easement, for its support, in that portion of the wall which stands on the adjoining lot. *Webster v. Stevens*, 553
2. So, when the owner of two adjoining lots erects a building on each, with a wall partly on each lot, for their common support, a conveyance, by him, of either lot, conveys, with the building, an easement for its support on that part of the wall which stands on the other lot. *id.*
3. In all cases where such an easement exists, neither owner or occupant can interfere with the wall, to the detriment of the other, without his assent. *id.*
4. But where such a common wall is erected by tenants for years, although it may be a party-wall, as between themselves, it creates no easement binding on the owner of the reversion in fee, that can prevent such owner, when the term expires, from dealing with his property, as if no such wall had been erected. *id.*
5. The legal rights of a grantee of a reversioner are exactly the same. *id.*

PLEADING.

1. A complaint, that a party "made" his promissory note in writing, that the other defendants "endorsed it in blank, and the same, so endorsed, was delivered to the plaintiff, who now holds and owns the same," imports that the maker delivered it to the payees, and the last endorser to the plaintiff. *Burrall v. Degroot*, 879
2. The fact, that a defendant's answer denies the receipt of notice of protest, does not make a notary's certificate of

the fact of service inadmissible as evidence. *id.*

3. When, to an action on a note, usury is set up in the answer, without its being stated whether it is set up as a defence or counter claim, it will be deemed to be set up as a strict defence, and that only, and the answer will not be taken to be true, merely because it is not replied to. *id.*
4. The code, in defining the requisites of an answer, has abolished the general issue, as formerly understood, and has, therefore, abolished the rules that formerly prevailed, as to the matter that might be given in evidence under that plea.
5. The only effect of a general or special denial of the allegations of a complaint, is to cast the burden of proof upon the plaintiff; but when that proof is given, no evidence of a defence, not set up in the answer, can be received. *Tazier v. Gossin*, 889
6. Under the Code, it is sufficient, as a pleading, in justifying under the judgment or final determination of an officer, or a court of special jurisdiction, to state that such judgment or determination was duly made. It is only when such allegation is controverted that the officer must establish at the trial the facts conferring jurisdiction. *Willis v. Hassmeyer*, 447
7. In an action for assault and battery, the defendant will not be permitted to put in an answer which admits the assault and battery, and merely alleges that there was provocation, which should mitigate damages. The real character of the transaction, and any matter which can properly mitigate damages, may be shown on the assessment of damages, on a default to answer. *Salts v. Kipp*, 646
8. A statement of the tenor and effect of the words complained of, in an action for slander, is bad pleading. The words spoken should be stated. *Forryth v. Edmiston*, 653
9. A complaint containing several causes of action, all of which belong to one of the classes named in section 167 of the

- Code, and affect all of the parties to the action, and do not require separate places of trial, cannot be demurred to, on the ground that such causes of action are improperly united, merely because they are not separately stated. In such a case the remedy is a motion, that the complaint be made more definite and certain, so as to show on its face, clearly and precisely, what distinct part of it is relied upon as constituting a separate cause of action. *Harnen v. Bayneud*, 656
10. A complaint, in an action by a married woman, which states, that a passenger carrier undertook to carry her and her baggage from California to New York; that the baggage was her separate property, and was stolen on the passage, is good in substance. If further particulars, as to the time or manner of her acquisition of the baggage, as separate property, or to show it to be such, are material, the remedy is by motion, under section 160 of the Code. The defect, if any, cannot be reached by demurrer. Her husband is not a necessary party to such an action. *Spies v. Accessory Transit Company*, 662
11. When the answer to a complaint, in an action of slander, denies each and every allegation of the complaint, and also justifies, by alleging that the plaintiff was guilty of the misconduct which the words impute, the court will not, on motion, direct one of the defences to be stricken out, nor coerce the defendant to elect between them, and rely on one alone. Especially, this will not be done, when the defendant swears that the answer is true, for it may be true, that he did not speak the words charged, and that the plaintiff committed the offence they impute. His right to justify does not depend upon his admitting the speaking of words which he never did speak. The right is absolute to set up as many defences as he may have. *Ormsby v. Douglas*, 665
12. A complaint upon a promissory note against maker and endorser, is not sufficient, under section 162 of the Code, if it fails to aver that the maker made the note, and that the endorser endorsed it, although the complaint contains a copy of the note and of its endorsements. An averment that a note was protested, is not equivalent to an averment that it was duly presented for payment to the maker, and payment was refused. *Prior v. McClave*, 670
13. In an action by a building association, against one of its members, to recover monthly dues, in arrear, it is no defence that the association is a "moneyed incorporation," within the provisions of the Revised Statutes, and that its charter, as such, had become void before the commencement of the action, from its failure to comply with the provisions of sections 29, 30 and 31, of the statute. (1 R. S., 535.) *Mechanics' Building Association v. Stevens*, 676
14. A cause of action, to restrain some of the part owners of a vessel from disposing of her, in derogation of the rights of other part owners, being the plaintiffs, cannot be joined with a cause of action for the hire of the vessel. *Coster v. New York and Erie R. R. Co.*, 677
15. In an action against several for a debt due by them as partners, one of them set up as a counter-claim, a claim for damages sustained by him, by alleged misconduct of the plaintiffs, in the management of his affairs under an agency formerly held by them from him. *Held*, that this counter-claim was bad, because—
- 1st. If the demand were regarded as based on contract it was a fatal defect, that there was no mutuality between the two contracts, and such demand was due to Bloomer alone.
- 2d. If it were deemed to be based upon tort, then it was not connected with the subject of the plaintiffs' action. *Peabody v. Bloomer*, 673
16. Certain stockholders in a corporation brought an action to recover from a person employed by the corporation, as its agent, moneys received by him in the course of such agency. *Held*, on demurrer to the complaint, that it was bad, for want of an averment, that the corporation, by its officers, had refused to bring an action. *Vanderbilt v. Garrison*, 689

17. When a defendant sets up, as a counter-claim, a note made by the plaintiff, payable to a third person, and endorsed to the defendant, the answer must aver such endorsement to have been made before the action was commenced. *Van Valen v. Lapham*, 689
18. The fact that the answer states such note to be a "counter-claim and cause of action existing against the plaintiff, at and before the commencement of the action," is not enough to show that it previously belonged to the defendant. The plaintiff has a right to require the answer to be so full and precise, that he may know whether the defence is to involve a disputed question of fact, or to depend solely on a question of law. *id.*
19. Where a demurrer is interposed to a complaint under the 6th sub. of section 144 of the Code, the true rule is, that such a demurrer applies only to such defects as would render the count bad on general demurrer at law, or bad for want of equity in chancery. *Graham v. Camman*, 697
20. The complaint, therefore, to be overthrown by such demurrer, must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever. *id.*
21. Where the demurrer admits facts enough to constitute a cause of action, the complaint will be sustained; and if the defendant requires a greater degree of certainty than is found in the complaint, he must seek his relief by a motion under the Code, that the pleading be made more definite and certain. *id.*
- See ACTION, 9.
COMPLAINT, 1, 2, 3.
- PLEDGE
1. When there is an implied authority to sell personal property pledged as collateral security for the payment of a debt, the sale to be valid must be public, and be preceded by a demand of payment and by a reasonable notice of the time and place of sale. *Wheeler v. Newbould*, 29
2. But there is no implied authority to sell when the collateral security consists only of the promissory notes of third persons. The only authority which, when the contract is silent, then passes to the creditor, by implication, is to reimburse himself by the collection of the notes, if the debt is unpaid at its maturity. *id.*
3. *Held*, in the principal case, that a sale made by the defendant of certain promissory notes, placed in his hands by the plaintiffs as collateral security for the repayment of a loan, was void, not only as irregular but as made without authority. *id.*
4. *Held*, therefore, that the plaintiff was entitled to judgment for the balance collected upon the notes beyond the amount of the loan. *id.*
- PRACTICE
1. ALIMONY.
 2. AMENDMENT.
 3. ANSWER.
 4. APPEAL.
 5. ARREST.
 6. ATTACHMENT.
 7. ATTORNEY.
 8. BILL OF EXCEPTIONS.
 9. BILL OF PARTICULARS.
 10. COMMISSION.
 11. COMPLAINT.
 12. CONTEMPT.
 13. COSTS.
 14. COUNTER-CLAIM.
 15. DEPOSIT IN COURT.
 16. DISCONTINUANCE.
 17. EXECUTION.
 18. IRREGULARITY.
 19. IRRELEVANT MATTER.
 20. JUDGMENT.
 21. JURISDICTION.
 22. LIT PENDENS.
 23. ORDERS.
 24. PARTIES.
 25. PROCEEDINGS SUPPLEMENTARY TO EXECUTION.
 26. REFERENCE.
 27. REMOVAL OF CAUSE.
 28. SUBSTITUTION.
 29. STAYING PROCEEDINGS.
 30. TRIAL.
 31. VERIFICATION.

Alimony.

1. When the judgment of divorce fixes the sum to be paid as permanent alimony, without prejudice to the right of the plaintiff, on a change of circumstances, to apply for an increased allowance, such an application will not be granted merely because her expenses have been increased, by the addition to her family of a person, whom the defendant is under no obligation to support, although his ability to pay may have been improved subsequent to the judgment. *Halsted v. Halsted*, 659

Amendment.

2. When the plaintiff gives notice of a motion for judgment, on account of the frivolousness of the answer, the defendant, if the time to amend has not expired, may amend, as a matter of course. Service of the amended answer before the time specified, in the notice for hearing the motion, will be an answer to it. *Burrall v. Moore*, 654
3. Such a motion is a summary demurrer, within the meaning of the provision of the Code, which allows a pleading demurred to, to be amended as a matter of course. *id.*
4. If the amendment is thought to have been made for the purposes of delay, the remedy is a motion to set aside the amended pleading. *id.*

Answer.

5. An answer which denies that the endorser of a note received due notice that payment of it had been demanded and refused, does not make a notary's certificate of the facts inadmissible as evidence, although the answer be verified. To produce that result, an affidavit must be annexed to the answer, denying the receipt of notice of non-payment. An answer containing such a denial, would not satisfy the statute. An answer, like a plea before the Code, performs only the office of a pleading, and whatever its allegations, does not affect the question as to the

nature of the evidence admissible to establish controverted facts. *Arnold v. Rock River Valley Union R. R. Co.* 207

Appeal.

6. An appeal from a judgment to the General Term only brings under review the questions of law raised at the trial, and the exceptions there taken. It brings the facts and evidence under consideration, no further than is necessary to raise the questions of law. *Marguart v. La Farge*, 559
7. Such an appeal will not present, for review, an order of the Special Term, denying a motion for a new trial, made on the ground that the verdict is against evidence. If the party wishes to raise that question in the General Term, he should appeal from the order denying a new trial. *id.*
8. Notice of a motion, under the last sentence of section 282 of the Code, need not be given to the appellant's sureties; it is enough that it is given to the owner of the judgment appealed from. *Livingston v. Roberts*, 680
9. On appeal, the respondent may except to the sureties in the undertaking, within ten days after it is filed, though more than ten days have elapsed after a copy of it, and the notice of appeal, were served. *Webster v. Stevens*, 682

Arrest.

10. When a foreign state is the plaintiff, an undertaking accompanying an order of arrest, signed and acknowledged by its resident minister, on the part of the plaintiff, is a valid undertaking within the provisions of the Code. *Republic of Mexico v. De Arangois*, 634
11. A person who has received money in a fiduciary capacity is liable to be arrested, although it is not stated that he had embezzled or fraudulently misapplied the sum claimed in the action. *id.*
12. When an order of arrest is founded on extrinsic facts, wholly unconnected with the right of the plaintiff to main-

tain the action, the burden of proof, when a motion to vacate the order is made, rests upon the plaintiff; and if the facts are positively denied, and the question, upon the whole evidence, of the defendant's liability to the arrest, remains in doubt, he is entitled to his discharge. But when the facts relied on in support of a motion to vacate an order of arrest constitute a defence to the action, that, if proved, would bar a recovery, the burden of proof is on the defendant, and if he fail to satisfy the court that the defence will certainly be established on the trial, the application for his discharge will be denied. *id.*

13. The court has no right to say, where the evidence is conflicting and doubtful, that the plaintiff cannot recover, when it is solely upon the truth of this proposition that a motion to vacate an order of arrest is founded. *id.*

Attachment.

See ATTACHMENT.

Attorney.

14. When a responsible attorney appears for a party, the court will not ordinarily inquire into the fact whether he was actually authorized to appear or not. *Republic of Mexico v. De Arangoiz*, 643
15. To warrant such an inquiry, circumstances must be shown calculated to raise a suspicion of fraud, or of an attempt to impose upon the adverse party, or to abuse or pervert the process of the court. *id.*

Bill of Exceptions.

See EXCEPTIONS.

Bill of Particulars.

16. After a dissolution of a partnership, and an action brought by the partner entrusted with the settling of the business, against his copartner for an account, the court will not order a general

bill of the particulars of the plaintiff's claim to be furnished. *Depew v. Leal*, 663

17. When the complaint states claims not evidenced by the books of the firm, and particulars of such claims are sought, the application should be special, and directed to the specific transactions of which particulars are sought, and the moving affidavits should state the grounds creating the necessity, or establishing the propriety, of granting the application. *id.*

Commission.

18. On the execution of a commission, the parties have a right to appear by counsel.
- Cross-interrogatories cannot be withdrawn unless by mutual consent.
- A witness cannot shield himself from answering a cross-interrogatory by a reference to his previous answer to a direct one. *Union Bank v. Torrey*, 626

Complaint.

19. A complaint will not be set aside, although neither that nor the copy served was folioed as required by rule 41, if retained twelve days, without objecting to the defect. Such acceptance, and delay to object, waive the defect. *Chatham Bank v. Van Veghten*, 628

See COMPLAINT, 1.

Contempt.

20. When the incipient proceedings to punish a party as for a contempt, is an order to show cause "why he should not be punished for the alleged contempt," and the contempt is denied, it is not essential to the validity of any final order that may be made, that interrogatories should be filed. *Watson v. Fitzsimmons*, 629
21. If a reference be ordered to ascertain and report the testimony and the facts, and both parties appear before the referee and submit evidence, the defendant cannot object, on the final hear-

- ing upon the report, that no interrogatories had been filed and answered. *id.*
22. In proceedings supplementary to execution, the judgment debtor cannot be punished, as for a contempt, for refusing to deliver his property to the receiver, when the order appointing the receiver does not contain such a direction, and no subsequent order to that effect has been made. *id.*
- Costs.*
23. When an action has been twice tried, the jury disagreeing on the first trial, and finding for the plaintiff on the second, and a new trial is granted to defendant on condition that he "pays the costs of the second trial,"—all he is bound to pay is the costs of the term at which the second trial was had. He is not bound to pay the fees of plaintiff's witnesses for attending at a term, or circuit, intermediate to those at which the two trials were had. *McQuade v. N. Y. and Erie R. R. Co.*, 613
24. Nor should he be required to pay the amount of any per centage that may have been allowed to the plaintiff, on the coming in of the verdict. That is to be granted to the party who recovers final judgment: not to both parties, as might happen if treated solely as a compensation for the labor and expenses of a trial. It is not to be allowed but once. When granted, it is allowed to the prevailing party by way of indemnity for his expenses in the action; and as well for expenses in one stage of the action as in any other, down to the entry of judgment. *id.*
25. A general assignee, for the benefit of creditors, is a trustee of an express trust. If he fails, in an action brought by him as such assignee, to recover a debt claimed to be owing from the defendant to his assignor, he cannot be charged personally for the costs, unless the court specially so orders, on the ground of his mismanagement or bad faith in such action. The costs are chargeable upon, and collectable out of the assigned estate. *Cunningham v. McGregor*, 648
26. The same rule of liability for costs applies to him that is applicable to executors or administrators. *id.*
27. It is not bad faith to prosecute a suit against the only responsible debtor of the assignor, without having funds to pay the costs of it, if unsuccessful, if the plaintiff believes, and has good reason to believe, that he is justly entitled to recover. *id.*
28. Whether the costs of a plaintiff "for all proceedings before notice of trial," shall be \$7 or \$12, depends solely upon the nature of the action, and not at all upon the fact whether an answer is, or is not put in. (Code, section 307, sub. 1.) *Candee v. Ogilvie*, 658
29. After the cause had been two terms on the calendar on the plaintiff's notice, he moved out of court on a five days' notice, and obtained judgment, on account of the frivolousness of the answer. *Held*, that he could not tax \$10 a term for either of those terms. *id.*
30. A plaintiff who sues in a court of record, in an action arising on contract, and for the recovery of money only, and proves contested demands, which, with those established by the defendant, exceed \$400 in amount, is entitled to costs as a matter of course, if he recovers any sum whatever. A justice of the peace has no jurisdiction of such an action, within the meaning of sub. 3 of section 304 of the Code. *Stilwell v. Staples*, 691
31. Demands contested by the pleadings, are "proved," within the meaning of that word, as used in section 54, sub. 3, if admitted at the trial. The admission at the trial dispenses with other evidence, and is itself the proof, on which the justice acts. *id.*
32. A plaintiff is not required to commence an action in a justice's court, and prove demands, which, with those proved by the defendant, shall exceed \$400, and then be dismissed, as a necessary preliminary to suing in a court of record. It is enough to entitle him to costs, that the facts, as proved in a court of record, establish it to be one, of which a justice of the peace, by § 54, has no jurisdiction. *id.*

Counter-Claim.

33. An answer, containing a counter-claim, is not demurrable, because it is not an answer to the whole of the plaintiff's cause of action. *Allen v. Haskins*, 332

34. The Code prescribes no rule, by which to determine the sufficiency of an answer containing a counter-claim, except that it must state facts sufficient to constitute a good cause of action, in favor of the defendant and against the plaintiff, and that it be one of the several causes of action defined by section 150 of the Code. *id.*

See PLEADING.

Deposit in Court.

35. When a plaintiff, against whom a judgment has been recovered, appeals from it to the General Term, and, on appealing, deposits \$250 instead of giving the undertaking required by the Code, and the judgment is affirmed by the General Term, and also by the Court of Appeals, on an appeal to the latter, and pending the latter appeal the money, so deposited, is lost, stolen, or embezzled, without any act of the respondent contributing to produce that result, the loss is that of the depositor, as between him and the respondent. *Parsons v. Travis*, 650

36. The court will not direct the amount of the deposit to be deducted from, nor the judgment satisfied on payment of the balance, or difference. *id.*

Discontinuance.

37. The mere fact that another action for the same cause has been brought in another state or country, furnishes no reason for the discontinuance of that previously commenced in this court. *Republic of Mexico v. De Arangois*, 643

Execution.

38. Executions, to be valid, need not state the time or place of their return. *Fake v. Edgerton*, 681

39. One against the body may issue short of sixty days, after the return of one against property. The former need not recite facts showing the right to arrest a defendant. *id.*

40. It is enough that he was held to bail by a valid order which continues in force. *id.*

Irregularity.

41. In an action of assault and battery, in which the defendant has given notice of appearance before the time for answering has expired, it is irregular to apply *ex parte*, and without notice, for an order that plaintiff's damages be assessed by a jury. *Saltus v. Kipp*, 646

42. The verdict of a jury on the execution of a writ of inquiry by the sheriff of the city and county of New York, to assess a plaintiff's damages, on defendant's failure to answer, will not be set aside for irregularity merely because the persons summoned as jurors were not on the list of jurors selected by the commissioners of jurors, no objection having been made on executing the writ, and it not appearing that the persons were not fit and competent jurors. *Jennings v. Asten*, 695

43. Nor because the complaint was read in evidence to the jury, it not appearing that it was offered for any specific purpose, for which it could not properly be read. *id.*

44. Nor on account of the excessiveness of damages, when the evidence on which the verdict was rendered is not disclosed by the affidavits on which the motion was made. *id.*

Irrelevant Matter.

45. New matter in an answer, which, although it may constitute a good cause of action, is, palpably, no defence, either total or partial, nor a counter-claim as defined by the Code, may be struck out on motion, as an irrelevant defence. *Kurtz v. M'Guire*, 660

Judgment.

46. When two persons are sued together, on a contract, which on its face is their joint contract, but which at all times was, in legal effect, the contract of only one of them, a judgment may be rendered against the latter, in favor of the plaintiff, and against the plaintiff, in favor of the other defendant. *Claf-
lin v. Butterfly*, 327
47. Under the Code, the plaintiff is not obliged, in an action against several, as joint contractors, to establish the contract against all of them, in order to recover against any of them. *id.*

Jurisdiction.

See JURISDICTION.

Lis Pendens.

48. The court has no power to order a *lis pendens* to be taken from the files of the court, which is in proper form, and has been filed in an action in conformity with the provisions of the statute. *Pratt v. Hoag*, 631
49. Although an injunction, which has been granted, and which restrained the defendant from disposing of the real estate sought to be charged by the action, has been dissolved, on the defendant's depositing in court a specific sum of money, as security for the payment of any judgment the plaintiff might recover; the *lis pendens* will not be ordered to be taken from the files of the court, notwithstanding its continuance may defeat a contract for the sale of the real estate, which the defendant may have made after the injunction was dissolved. A plaintiff may give actual notice of his claim to any person who contemplates purchasing, and he may give such a notice as the statute authorizes. *id.*

Orders.

50. An order for a bill of particulars, and a stay of proceedings until the bill is furnished, no longer operate, *per se*, to enlarge the time to plead. The only

way in which such an extension can be procured, is by an order expressly granting it, founded on proper affidavit. *Platt v. Townsend*, 668

51. A decision at Special Term overruling a demurrer to a complaint, and giving leave to answer, is an order and not a judgment, while the privilege given to answer is continuing. *Ford v. Turner*, 684
52. A decision of the General Term, which merely affirms such order, is, itself, an order, when the complaint is one on which the court must subsequently decide at Special Term what is the nature and extent of the relief to be granted. *id.*

53. An appeal from such a General Term decision, accompanied with the undertaking prescribed by section 334 of the Code, does not stay proceedings on the part of the plaintiff. An application for a stay, in such a case, and under such circumstances, should be denied. *id.*

Parties.

54. A republic, acknowledged as such by our own government, is an independent sovereign power, and, therefore, a state just as certainly, and in the same sense, as a monarchy, limited or absolute. *Republic of Mexico v. De Arangois*, 634
55. A state is a moral person, having an understanding and a will, capable of possessing and acquiring rights, and of contracting and fulfilling obligations. *id.*
56. As a state is a person possessing rights which the law defines and may enforce, its competency to assert those rights in a court of justice, in every country where their assertion may be necessary inevitably follows. It has the same right to sue for the recovery of a debt as an individual creditor, and the same right to sue by its appropriate name, that which designates its being and character as a state, as a foreign corporation by its corporate name. The denial of this right to a foreign state, acknowledged as such by our own government, and with whom we

- are at peace, would be a grave subject of remonstrance and complaint, and might even be deemed a just cause of war. *id.*
57. When the accredited minister of a foreign state declares that he is acting under the authority of his government, no court of justice, nor even the government to which he is accredited, can rightfully demand a copy of his instructions. *Republic of Mexico v. De Arangois*, 648
58. In an action against several, for the specific performance of their joint contract, to purchase real estate of the plaintiff, and secure a part of the price by their bond and mortgage, payable at a future day, all of them must be served with the summons, or appeal in the action, to enable the court to render a judgment which will be a complete determination of the controversy. *Powell v. Finch*, 666
59. If brought to trial, upon the answers of a part of the defendants only, when the others have not been served with process, or appeared in the action, the court will not permit the trial to proceed. *id.*
60. Four persons, joint owners of a vessel, leased her, and two of them afterwards brought suit for the hire. *Held*, 1st. That a legal action could only be sustained by all four suing together. 2d. That fewer than all might proceed upon equitable rights, and enforce them in equity. 3d. That to entitle themselves to do so, they must show in their complaint facts which excused them from joining the other co-owners as plaintiffs, and in such case must join them as defendants, unless it be shown that they had ceased to have any interest in the matters in controversy. *Coster v. New York and Erie Railroad Co.*, 677
61. The complaint averred that the defendants had, some months after the lease was given, with intent to defraud the plaintiffs, purchased from the other parties interested their shares in the vessel. *Held*, 1st. That the suggestion of fraud was immaterial, since, as respected the plaintiffs, the defendants had a right to purchase those shares. 2d. That the averment of the sale of those shares, did not present any reason or excuse for not making the former owners of them parties, although it was a reason for proceeding in equity; it not appearing that they had transferred their interest in the hire which accrued prior to the sale of their shares in the vessel itself. *id.*
- See ACTION, 17.
COMPLAINT, 2, 3.
- Proceeding Supplemental to Execution.*
62. A judgment-debtor who appears pursuant to an order for his examination, which, by its terms, is returnable before "one of the Justices of the court," instead of "the Judge" who made it, and without objection to the form of the order, submits to an examination, and omits to appeal from a subsequent order appointing a receiver, waives all objection to the jurisdiction of the Judge to take the examination and make the appointment. *Hobart v. Frost*, 672
- Reference.*
63. The court will not reverse a judgment on the report of a referee, upon an alleged erroneous finding of the facts, unless such finding be so clearly against evidence, or without evidence, as to create a reasonable apprehension of his bias, partiality, or mistake. *Brooks v. Christopher*, 216
64. It is not enough that the court see such reason to doubt the correctness of the finding, that they would have sustained the report if the referee had come to the opposite conclusion, or that the court think they should, upon the evidence, have found otherwise than he has done. *id.*
65. Where, on the trial, a referee received evidence of the declaration of a third party, but with a proviso that such evidence should be struck out, if the defendant did not supply other proposed evidence bringing such declarations home to the plaintiff, by showing his assent thereto, or adoption thereof,

and afterwards the referee, for the want of such supplemental evidence, struck out such declarations, and so reported. *Brooks v. Christopher*, 216

66. The court would not interfere with the report, unless the defendant excepted to such provisional reception of the evidence, or, at the close of the case, obtained a specific ruling thereon, and then excepted. *id.*

Removal of Cause.

67. In removing a cause from the state courts to the Circuit Court of the United States, the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next Circuit Court to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him; and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein.

Held, that the entry of an appearance in a state court must be interpreted by the course and practice of that court; and that what is held in such court to be a submission to its authority in the cause, whether coerced or voluntary, must be deemed an appearance. And further, when such submission has once been made, it cannot be retracted. *Cooley v. Lawrence*, 605

68. *Held*, also, that the defendants, by appearing, in this action, by counsel, and opposing a motion for an injunction, and reading affidavits in opposition to such motion, and filing the same, with the names of their attorneys in this action endorsed thereon; and by moving that all proceedings in this action be stayed, had submitted themselves to the jurisdiction of the court, and appeared in the action unconditionally. *id.*

Substitution.

69. When, *pendente lite*, in an action on contract, the plaintiffs sell and assign

the subject matter of the action to a third person, he will not be substituted as plaintiff, on motion of the plaintiffs to the record, and without notice to him. The alleged purchaser is the person to move for substitution; and he should do so, on notice to the plaintiffs, as well as to the defendant. Even in such a case, it is not a matter of course, to order a substitution, without imposing any conditions. *Howard v. Taylor*, 604

Staying Proceedings.

70. The plaintiff had formerly brought an action, in this court, for legal relief against some of the defendants in this action. His complaint was dismissed with costs, but without prejudice to an action for equitable relief.

Without having paid the costs of the former action, he brought this one to obtain equitable relief.

Held, that the court would not stay the proceedings in this action, as a matter of course, until the costs of the former one were paid. *Davis v. Duffie*, 688

Trial.

71. At the trial of a cause, after certain documents had been produced and proven, the counsel of the plaintiffs stated that the various items of their account amounted to between five hundred and six hundred dollars, but offered no evidence. The court then made the direction, for taking a verdict for \$750, subject to the opinion of the General Term, and in case the General Term sustained the plaintiffs' right of action, then a reference to ascertain their damages.

Held, that the course pursued at the trial was irregular. That the cause could not be tried before a jury in part, and a verdict taken, and, partly, by a referee afterwards to be appointed. *Buchanan v. Chesborough*, 238

72. In a proper case, where the propriety of a reference is disclosed on a trial, the cause may probably be withdrawn from the jury, but should be so altogether. *id.*

73. Actions commenced and at issue be-

fore the Code took effect may be noticed for trial by the defendant, as well as by the plaintiff. *Reynolds v. Davis*, 611

74. An action, at issue, upon issues of fact only, and noticed for trial and placed on the calendar, if the defendant fails to appear when it is reached in its order, must be tried by the court and jury, or by the court alone, if the plaintiff elects to treat the failure of the defendant to appear as a waiver by him of the right to a trial by a jury. *Gibberton v. Flesschel*, 652

75. If, in such a case, the plaintiff has the defendant's default entered for not appearing, and obtains an order that the damages be assessed by a sheriff's jury, the assessment of damages will be set aside. *id.*

76. When an answer sets up, among other defences, a prior action pending for the same cause, and on a reference of the latter issue by consent, the referee has reported upon it in favor of the defendant, the court will order the complaint to be dismissed without a trial of the other issues, if no valid exceptions be taken to the report of the referee. *Blydenburgh v. Borst*, 657

Verification.

77. An affidavit, verifying a complaint, which merely states that the complaint is true, without stating that it is true to the knowledge of the party making the affidavit, is substantially defective. A defendant, in such a case, may serve an unverified answer. If the plaintiff refuses to receive the answer, and enters up judgment, the latter will be set aside for irregularity. *Williams v. Riel*, 601

78. When the affidavit of verification, annexed to the copy of a complaint, contains neither the name of any person who has sworn to it, nor of any officer before whom it has been sworn to, the complaint may be treated as unverified, and an unverified answer may be served. *id.*

RE

RELEASE.

1. The provision in the Revised Statutes, permitting an inquiry into the consideration of a sealed instrument, has not altered the rule of the common law, that a release under seal, although reciting only a nominal consideration extinguishes the debt to which it relates. *Stearns v. Tappin*, 294

2. Parol evidence, to contradict the terms or legal effect of such a release, is inadmissible, and hence, evidence to show that it was founded upon any other consideration than that which it states must be rejected. *id.*

3. But where the consideration of the release is nominal, the moral obligation to pay the debt remains, and is a sufficient consideration for a new promise of payment. *id.*

4. The effect of such a promise, however, is not the same as that of a promise to pay a debt barred by the Statute of Limitations. It creates a new debt, and in an action for the recovery of the debt, the promise by which it was created, must be stated in the complaint as the cause of action. *id.*

5. When the debt released was evidenced by a negotiable note, a promise of payment to the payee does not enure to the benefit of a subsequent endorsee, for as the release extinguishes the note, its subsequent transfer is wholly void. *id.*

S

SALES.

1. Upon the sale of an interest in a patent, the purchaser is precluded from setting up the want of value in the invention, or insufficiency of the materials, where he has sold the right transferred to him, to another for value. He cannot defend an action for the unpaid purchase money on that ground. It would be otherwise if there had

been a warranty, or express representation of the value or character of the article. *Thomas v. Quintard*, 80

2. By parting with the patent, he had disabled himself from reinstating the plaintiff in its possession, and this forms another answer to his defence. *id.*
3. The intention of the parties in a contract of sale, must be collected from the whole instrument; and in order to carry that intention into effect, the literal import of the words used may be disregarded. *Kelley v. Upton*, 336
4. The true character of the contract, as executed or executory, depends upon the proper answer to the question, whether it was intended to vest in the purchaser a present and absolute title to the thing sold. *id.*
5. Where the delivery of the thing sold, and the payment of the price, are to be simultaneous acts, the title, until delivery or payment, remains in the seller. *id.*
6. Where the acts are to be thus concurrent, the promises of the parties are dependent upon a mutual performance, and neither can maintain an action against the other, without showing, on his own part, an actual performance, or a legal offer to perform. *id.*
7. Hence, when the contract relates to a future transfer of stock, the seller, to maintain an action for the price, must prove a tender of the stock, before the action was commenced. *id.*
8. The mere admission, by the purchaser, of his liability, when payment is demanded, does not operate as a waiver of such tender. *id.*

See VENDOR and VENDEE.

SHERIFF.

1. A sheriff who, in an action for the delivery of personal property, returns that he had taken the property in question, from the defendant, and de-

livered it to the plaintiff, is estopped from denying the truth of the facts, that the return asserts, or necessarily implies. *Kuhlman v. Orser*, 243

2. He is not, therefore, permitted to allege, that the property was not in the possession of the defendant, but was in his own custody, by force of a levy under an attachment previously issued. *id.*
3. This return is conclusive proof that, in his own judgment, the property was not bound by the attachment, and operates to release it from any lien that a prior levy might have created. *id.*
4. The notice, required to be given in the execution of a warrant of attachment, under section 235 of the Code, must describe, particularly, the property levied on, so as to enable the holder to identify it, and deliver it to the sheriff, when his own claims are satisfied. *id.*
5. A notice referring, in general terms, to the property, as belonging to the debtor in the attachment, is insufficient and void. *id.*
6. As against a *bond fide* purchaser, personal property is only bound by an attachment from the time of an actual levy. *id.*
7. In proceeding under an attachment, the sheriff acts as much at his own peril, as in proceeding under an execution. *id.*
8. Hence, he renders himself liable, as a trespasser, by taking and removing the goods of a person not named as a debtor in the attachment. *id.*

See ACTION, 3.

SLANDER.

See PLEADING, 8.

SURETIES.

1. A. was appointed, by a Surrogate, administrator, *ad colligendum*, pending a

contest upon a will. He employed B., as his agent, to collect the moneys of the estate. Subsequently, B. was appointed administrator, *ad colligendum*, in the place of A. At this time, B., as agent, had a sum of money in hand, collected for A. Upon passing the accounts of the latter, he was charged with such sum, and B. gave him a receipt for the same; whereupon A. was credited such amount. B., upon being appointed, gave the usual bond, with the defendants Taylor and Swords as his sureties, conditioned, among other things, to account for all money, property, and things in action, received by him as such collector, whenever required, &c.

Held, that the sureties were responsible for the money thus collected by B., as agent, and comprised in his receipt to the former collector, A. *Gottberger v. Smith*, 566

2. *Held*, by Hoffman, Justice, that if the moneys had been in his hands, as a debtor to the estate, when he was appointed collector, the sureties would have been responsible, reserving to them the right to prove that the debt of the principal—the collector—was desperate, as he could have proven that the debt of a stranger was not collectable. *id.*

T

TRUSTS.

1. As a general rule, when a fund is in the hands of a trustee, which he is bound to distribute to different persons in unequal proportions, all interested in the distribution are necessary parties to an action against the trustee. *General Mutual Ins. Co. v. Benson*, 168

2. But when the sum that each is entitled to receive has been ascertained, by a proceeding binding on the trustee, each may maintain a separate action for his proportionate share, thus ascertained. *id.*

D.—V.

U

USURY.

1. When a note or bill is sold at its inception, at a discount exceeding the legal rate of interest, having no validity except that which such sale imparts, it is usurious and void. *Clark v. Loomis*, 468

2. This rule has been acted upon in this state so long and so uniformly, that the courts are not at liberty to treat it as an open question. *id.*

3. The fact, that it contains the words "value received," does not estop any party to it from showing that it was usurious at its inception. *id.*

4. The delivery to the parties, who discounted such a bill usuriously, of another bill made by the parties to the first one, and made and delivered merely as security for the payment of the first, and having no other consideration to support it, renders the second bill equally void as the first. *id.*

V

VARIANCE.

1. Where the defence, relied on at the trial, differs, in its entire scope and meaning, from that set up in the answer, the court has no power to treat the variance as immaterial, or to direct the answer to be amended, or the fact to be found according to evidence. *Tezier v. Gouin*, 380

2. If proof of such a defence, although objected to, is admitted by the court, a verdict for the defendant, founded thereon, will be set aside, as contrary to law. *id.*

VENDOR AND VENDEE.

1. The custom, in the port of New York, upon the sale of grain is, that the pur-

chaser selects a measurer, and the measurer so selected is appointed by the board of measurers to perform the duty.

Held, that where the measurement is, in fact, made by a measurer appointed by the board, the custom is substantially complied with, and it is immaterial whether the measurer is selected by the seller or purchaser. *McCready v. Wright*, 571

2. *Held*, that when the quantity sold has been ascertained by such measurement, and the purchaser has an order for the delivery of the grain, upon the storekeeper, in whose custody it is, the delivery, so far as the seller is concerned, is complete. *id.*

W

WILL.

J. W., by his last will and testament, devised a house and lot, in the city of New York, to his executors, in trust, to pay over the rents, &c., to his father during his life, and after the death of his father, to pay out of the income an annuity of \$300 to his mother, during her life, and the residue to his sister M. M. B. After the death of his mother, to pay the whole income to his sister during life, and after the decease of his father, mother, and sister, to pay the income to the three children of his sister, A. H. M., N. M., and M. M., as soon as the youngest of them should attain the age of 21, during their lives. After their death, and as soon as the youngest child of any of them should attain the age of 21, to sell the property, and divide the proceeds among the children of the children named in the will, in certain specified proportions.

Held, that the devise to the executors was either, as an entirety, wholly void, or was valid only during the lives of the father and sister of the legatee, and that, upon either supposition, the children of the sister became entitled, upon her death, as her heirs-at-law, to

the house and lot, as tenants in common in fee. *O'Brien v. Mooney*, 51

WITNESS.

1. This action was brought by a debtor and assignor, and some of his creditors, on behalf of all the creditors, against the assignee, charging him with fraud or gross negligence in the sale of the property assigned to him for the benefit of the creditors, and praying that he might be compelled to account for the full value of the property sold. On the trial the debtor was offered as a witness on behalf of his co-plaintiffs, and rejected.

Held, that he was properly rejected, as he was jointly interested with the creditors who were plaintiffs, and could not have given any material evidence that would not have enured to his own benefit as well as that of his co-plaintiffs. *Brahms v. Joyce*, 16

2. A creditor, not a plaintiff on the record, was also offered as witness on behalf of the plaintiffs, and was rejected as incompetent.

Held, that he ought not to have been excluded, for although the action was brought for all the creditors, he was not in any legal sense of the term a party to the action, nor was it prosecuted for his immediate benefit, according to the interpretation that, in other cases, has been given to those words. *id.*

3. An endorser of negotiable paper is not an assignor within the meaning of the Code. His examination as a witness does not render the party against whom he is examined a competent witness under § 399 of the Code. But where the adverse party has been examined as a witness, and is nevertheless defeated on the trial, the objection that he was improperly admitted, cannot be raised by the prevailing party, although made on the trial, on the argument of a motion for a new trial, as an answer to such motion. *Anderson v. Busteed*, 485

4. Having been admitted as a witness, although improperly, if it appear that any material question put to him, that ought to have been allowed, was overruled, a new trial must be granted, since the court cannot say, that had the evidence thus excluded been received, the same verdict or judgment would have been rendered. *id.*
5. The stockholders of an incorporated bank, however few in number, are competent witnesses on behalf of the corporation. *New York and Virginia State Stock Bank v. Gibson,* 574

THE END.

J. H. W. G.

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